TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 124.

SOUTHERN SURETY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF OKLAHOMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

FILED APRIL 11, 1914.

(24,158)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1915.

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a *Certificate of Lodgment.*

Supreme Court.

STATE OF OKLAHOMA, *ss:*

I, W. H. L. Campbell, Clerk of the said court, do hereby certify that there were lodged with me as such Clerk on January —, 1914, in the matter of the Southern Surety Company, plaintiff in error, versus the State of Oklahoma, defendant in error:—

1. The original bond of which a copy is herein set forth.

2. Two copies of the writ of error, as herein set forth,—one for the defendant in error and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Oklahoma City, State of Oklahoma, this 20" day of February, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

1 Filed Jan. 29, 1914. W. H. L. Campbell, Clerk.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Oklahoma, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of Oklahoma, wherein the State of Oklahoma is Plaintiff in Error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of Supreme Court of the State of Oklahoma, this 29th day of Jan'y, 1914.

SAMUEL W. HAYES,
Chief Justice Supreme Court of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma.
By JESSIE PARDOE, *Deputy.*

2 & 3 I, Charles West, Attorney General of the State of Oklahoma, hereby acknowledge due service of the within and foregoing Citation, and do hereby enter the appearance of the State of Oklahoma, the defendant in error, in the Supreme Court of the United States.

Dated at Oklahoma City, Oklahoma, on this 29th day of January, 1914.

CHAS. WEST,
Attorney General of the State of Oklahoma.

Filed Jan. 29, 1914. W. H. L. Campbell, Clerk.

4 & 5 Filed Jan. 28, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 2162.

SOUTHERN SURETY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Defendant in Error.

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court of the State of Oklahoma in rendering a judgment against it in the above entitled case, the plaintiff in error hereby prays a writ of error from the said decision and judgment, to the Supreme Court of the United States of America, and an order fixing the amount of a supersedeas bond.

Assignments of error herewith.

C. S. ARNOLD,
Attorney for Plaintiff in Error.

STATE OF OKLAHOMA,
Supreme Court, ss:

Let the Writ of Error issue upon the execution of a bond by the Southern Surety Company, plaintiff in error, to the State of Oklahoma, defendant in error, in the sum of Two Thousand Dollars; such bond, when approved, to act as a supersedeas.

Dated on this 27th day of January, 1914.

SAMUEL W. HAYES,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL, *Clerk.*
By JESSIE PARDOE, *Deputy.*

Filed Jan. 28, 1914. W. H. L. Campbell, Clerk.

6 Filed Jan. 28, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 2162.

SOUTHERN SURETY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Defendant in Error.

Assignment of Error.

Now comes the above named Southern Surety Company, the plaintiff in error herein and the defendant in the trial court, and files herewith its petition for a writ of error and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignment:

First. The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of the Enabling Act, Section 16 (34 Stat. L. 1286 as amended by act of Congress approved March 4, 1907, Ch. 2911) and Section 20 (34 Stat. L. 1287 as amended by the act of Congress approved March 4, 1907, Ch. 2911), a prosecution for the crime of adultery committed in the Indian Territory before statehood in violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amendments) was, when Oklahoma was admitted into the Union, properly transferred to and proceeded with in a district court of the State of Oklahoma. The validity of the authority exercised by the district court of the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to Section 1 of Article III of the Constitution of the United States, and in contra-
7 vention of Section 711 of the Revised Statutes of the United States.

Second. The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of Section 16 of the Enabling Act (34 Stat. L. 1286 as amended by the act of Congress of March 4, 1907, Ch. 2911), a grand jury impanelled by a district court of the State of Oklahoma had authority and jurisdiction to indict a person for a violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amendments) committed in the Indian Territory before statehood. The validity of the authority exercised by the said district court of the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to Section 1 of Article III of the Constitution of the United States, and in contravention of Section 711 of the Revised Statutes of the United States.

Third. The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of the Enabling Act, Section 16 (34 Stat. L. 1286 as amended by act of Congress approved

March 4, 1907, Ch. 2911) and Section 19 (34 Stat. L. 227) and Section 20 (34 Stat. L. 1287 as amended by act of Congress approved March 4, 1907, Ch. 2911), a district court of the State of Oklahoma had authority to declare a forfeiture of a criminal appearance bond given to the United States of America as obligee and taken and approved by a Commissioner of a United States Court in the Indian Territory before statehood, and which bound the principal in said bond to appear before a United States Court to answer for a violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amend-
8 ments) committed in the Indian Territory before Statehood.

The validity of the authority exercised by the said district court of the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to Section 1 of Article III of the Constitution of the United States, and in contravention of Section 711 of the Revised Statutes of the United States.

Fourth. The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of the Enabling Act, Section 19 (34 Stat. L. 227) a district court of the State of Oklahoma had authority to hear and determine a suit brought by and in the name of the State of Oklahoma, as plaintiff, against the Southern Surety Company, plaintiff in error, as defendant, upon a criminal appearance bond given to the United States of America as obligee and which was taken and approved by a Commissioner of a United States Court in the Indian Territory before statehood, said Southern Surety Company, plaintiff in error being a surety thereon, and which bond bound the principal therein to appear before a United States Court to answer for a violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amendments), to-wit: adultery, committed in the Indian Territory before statehood. The validity of the authority exercised by the said district court of the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to Section 1 of Article III of the Constitution of the United States, and in contravention of Section 711 of the Revised Statutes of the United States.

Fifth. The Supreme Court of the State of Oklahoma erred
9 in holding and deciding that, under the terms of Section 19 of the Enabling Act (34 Stat. L. 227), the State of Oklahoma at statehood became subrogated to all rights, powers and privileges of the United States as original obligee in a criminal appearance bond given to the United States of America as obligee and taken and approved by a Commissioner of a United States Court in the Indian Territory before statehood, and which bound the principal in said bond to appear before a United States Court to answer for a violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amendments), to-wit: adultery, committed in the Indian Territory before statehood. The validity of the authority exercised under the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to the

Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law; also on the ground of its being repugnant to Section 10 of Article I of the Federal Constitution in that it impairs the obligations of contracts; also on the ground of its being repugnant to the provisions of Section 1 of Article III of the Federal Constitution.

Sixth. The Supreme Court of the State of Oklahoma erred in affirming the judgment and decree of the trial court rendered in said cause and in refusing to give and denying to plaintiff in error the rights afforded and protection given it under the Federal Constitution and Acts of Congress aforesaid.

10 & 11 For which errors the plaintiff in error, the Southern Surety Company, prays that the said judgment of the Supreme Court of the State of Oklahoma, dated October 15, 1912, be reversed and a judgment rendered in favor of the plaintiff in error, and for costs.

C. S. ARNOLD,
Attorneys for Southern Surety Company,
Plaintiff in Error.

12 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the Southern Surety Company and the State of Oklahoma, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnanaunt to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause or the said Constitution, treaty, statute of commission; a manifest error hath appeared, to the great damage of the said Southern Surety Company, as by its complaint appears. We being willing that error, if any hath been should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Su-

preme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of Jan'y, A. D. 1914.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of United States,
Western District of Oklahoma.

Allowed January 27th, 1914:
SAMUEL W. HAYES,
Chief Justice Supreme Court of Oklahoma.

Filed Jan. 28 1914. W. H. L. Campbell, Clerk.

13 & 14 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of the State of Oklahoma, at Oklahoma City in the State of Oklahoma, on this 20" day of February, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of
the State of Oklahoma,
By JESSIE PARDOE, *Deputy*

Costs of Suit.

Plaintiff in Error's costs, $23.25, paid by Southern Surety Company.

Defendant in Error's costs, $——.

Costs of transcript, $11.75, paid by Southern Surety Company.

W. H. L. CAMPBELL,
Clerk of the Supreme Court of
the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

15 Filed Jan. 29, 1914. W. H. L. Campbell, Clerk.

No. 2162.

SOUTHERN SURETY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Defendant in Error.

Bond.

Know all men by these presents: That we, the Southern Surety Company, as principal, and B. E. Jennings and W. A. Jennings as sureties, are held and firmly bound unto the State of Oklahoma in the sum of Two Thousand ($2,000.00) Dollars, to be paid to the said State, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 27th day of January, 1914.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Oklahoma.

Now, Therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

SOUTHERN SURETY COMPANY,
By C. S. ARNOLD.
B. E. JENNINGS,
W. A. JENNINGS,
Sureties.

16 & 17 STATE OF OKLAHOMA,
Oklahoma County, ss:

B. E. Jennings and W. A. Jennings being each duly sworn according to law, on oath depose and say: We are each of lawful age and citizens of the State of Oklahoma, and know the contents of the foregoing instrument to which we have signed our names. We each for himself say we are worth the sum of Two Thousand Dollars, over and above all debts, liabilities and exemptions.

B. E. JENNINGS.
W. A. JENNINGS.

Subscribed and sworn to before me on this 27th day of January, 1914.

[SEAL.] LURA A. PORTER,
Notary Public in and for
Oklahoma County, Oklahoma.

My commission expires Sept. 13th, 1915.

Bond approved, and to operate as a supersedeas.
Dated on this 29th day of Jan'y, 1914.

SAMUEL W. HAYES,
Chief Justice of the Supreme Court
of the State of Oklahoma.

18 Filed Dec. 3, 1910. W. H. L. Campbell, Clerk.

In the Supreme Court for the State of Oklahoma.

2162.

SOUTHERN SURETY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Defendant in Error.

The Plaintiff in Error, Southern Surety Company, complains of the defendant, State of Oklahoma, for that at the October term of the District Court in and for Pittsburg County, Oklahoma a judgment was rendered against Plaintiff in Error and in favor of the Defendant in Error for the sum of $750.00. That plaintiff in error alleges that there is error in the said proceedings of the aforesaid District Court in the following particulars hereinafter set forth.

That said errors will fully appear in the case-made hereto attached and made a part of this petition in error, same being marked "Exhibit A".

(1) Because the judgment of the said District Court is not supported or justified by the evidence.

(2) Because the said District Court erred at the trial of the said cause in admitting incompetent, irrelevant and immaterial evidence as follows: In admitting in evidence the bond sued upon which bond is copied in the original petition as Exhibit A, and also marked Exhibit A in the evidence. In admitting the bail bond of J. B. Stout marked Exhibit B to the original petition and also as Exhibit B in the evidence. In admitting the record of the forfeiture of the said bond in the said District Court as shown by Exhibit C in the evidence.

(3) That the said District Court erred in overruling the demur to the evidence offered by the Defendant in Error *in* at the
19 trial in support of its petition.

(4) That the said District Court erred in overruling the demurrer filed to the original petition, to the over-ruling of which Plaintiff in Error at the time excepted.

Wherefore Plaintiff in Error prays that the said cause be reversed and remanded to the said District Court with directions to dismiss.

J. E. WHITEHEAD,
Attorney for Plaintiff in Error.

20 In the District Court in and for Pittsburg County, Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendant-.

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21 In the District Court in and for Pittsburg County, Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Case-made.

Be it remembered That at the October 1909 Term and other terms of this Court prior thereto, the following proceedings were had in the above styled cause, to-wit:

22 Upon January 23rd, 1909, the County Attorney of Pittsburg County, filed his petition against the defendants, J. B. Stout and Southern Surety Company, which petition was in words and figures as follows, to-wit:

23 In the District Court of Pittsburg County, Fourth Judicial District, State of Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Petition.

Comes the State of Oklahoma, Plaintiff in the above entitled cause, by T. R. Dean, County Attorney in and for Pittsburg County, State of Oklahoma, and, for cause of action against defendants, alleges:

That, on October 10th, 1907, the said defendant, J. B. Stout, being charged by complaint made before J. W. McMillan, United States Commissioner, with the crime of adultery in the United States Court for the Central District of Indian Territory, at McAlester, and his bail thereon being fixed in the sum of Seven Hundred and Fifty ($750.00) Dollars, as principal, and the said defendant, Southern Surety Company as surety, made and executed a bond unto the United States of America, as obligee, in the said sum of seven hundred and fifty dollars, wherein and whereby it was stipulated and expressed that said J. B. Stout should personally appear before the said United States Court for the Central District of Indian Territory, at McAlester, on the first day of November, 1907, term thereof, and from term to term thereafter until finally discharged by said court, and then and there abide the further orders of said court, and not depart therefrom without leave thereof, conditioned that if the said J. B. Stout should not so appear, abide and remain, then the said amount expressed in said bond should be forfeited and paid to the said United States of America,
24 a copy of which bond, marked "Exhibit A", being attached thereto, is made a part hereof.

That, on November 16, 1907, plaintiff became the State of Oklahoma and had imposed on her the duty of prosecuting the alleged crime of adultery, charged as above stated against said J. B. Stout, and succeeded to the rights of the United States as obligee in said bond. That, thereafter, to-wit: on the 8th day of January, 1908, in the district court of Pittsburg County, State of Oklahoma, the successor of the said United States Court for the Central District of Indian Territory, at McAlester, an indictment was filed against said defendant, J. B. Stout, upon said charge of adultery, and thereafter, to-wit: on the 11th day of March, 1908, said cause being called for trial in said district court of Pittsburg County, State of Oklahoma, the said J. B. Stout, failed to appear or answer, but made default; whereupon a forfeiture of said bond was by said court declared, taken and adjudged. That defendants have not paid said forfeiture nor any part thereof.

Wherefore, plaintiff prays judgment against defendants for the said sum of $750.00 and all cost herein expended.

T. R. DEAN,

County Attorney, Pittsburg County, State of Oklahoma.

25 (EXHIBIT A.)

Recognizance to Appear Before Court.

UNITED STATES OF AMERICA,
Indian Territory, Central District, ss:

Know all men by these presents, That we, J. B. Stout, as principal and Southern Surety Company, *and* as surety, are held and firmly bound unto the United States of America in the just and full sum of Seven hundred and Fifty ($750.00) Dollars, for the

payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, by these presents.

In witness whereof, we have hereunto subscribed our hands and affixed our seals (using scrolls for seals) this the 10th day of October, 1907.

Whereas, the above-bounden J. B. Stout stands charged by information in the United States Court in the Central District of the Indian Territory at McAlester with the crime of adultery and introducing and disposing of whiskey and has been arrested and is duly in custody under and upon said charges aforesaid:

Now, the conditions of this obligation are such, That if the said J. B. Stout shall personally appear before the United States Court in the Central District of the Indian Territory aforesaid, at McAlester, in said District on the first day of the next November, 1907, term thereof, and from term to term thereafter until finally discharged by said court, and then and there abide the further order of said court and not depart therefrom without leave thereof, then this recognizance to be void; otherwise in force.

Signature of Principal and Sureties:

J. B. STOUT. [SEAL.]
SOUTHERN SURETY COMPANY, [SEAL.]
[SEAL.] By D. F. D. UNGLES, [SEAL.]
Agent & Attorney in Fact. [SEAL.]

Exhibit A.

26 Thereafter upon January 28th, 1909, the defendant, Southern Surety Company, filed its said cause in demurrer to said petition, which said demurrer was in words and figures as follows, to-wit:

In the District Court of Pittsburg County, State of Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Now comes the Southern Surety Company, one *to* the above named defendants, and for its demurrer to the petition of the plaintiff states:

First. That this court had no jurisdiction to indict the defendant J. B. Stout for an offense committed prior to the admission of the State of Oklahoma into the Union.

Second. That this court had no jurisdiction to forfeit the said bond as alleged in plaintiff's petition.

Third. That this court has no jurisdiction of this cause of action against this defendant or the said J. B. Stout.

Fourth. That the petition of the plaintiff does not state facts sufficient to constitute a cause of action against the defendant.

Wherefore: This defendant prays the judgment of the court.

J. E. WHITEHEAD,
Attorney for Defendant, So. Surety Company.

27 Thereafter upon the 28th day of May, 1909, the demurrer coming for hearing was by the Court overruled to which, defendant, Southern Surety Company, excepted, the Journal Entry of which proceedings is as follows, to-wit:

STATE OF OKLAHOMA
vs.
J. B. STOUT et al.

Now on this day comes for hearing the demurrer heretofore filed by defendant to plaintiff's petition herein, and the court, after hearing said demurrer, and being well and sufficiently advised in the premises doth overrule the same, to which ruling of the court, the defendant at the time duly excepted, and it is further ordered that defendants herein —, and they are hereby allowed ten days in which to answer herein.

28 Thereafter upon June 12th, 1909, the defendant, Southern Surety Company, filed in said cause its separate answer, which answer was in words and figures as follows, to-wit:

In the District Court of Pittsburg County, Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Separate Answer of the Southern Surety Company.

Now comes the Southern Surety Company and for its separate answer to the petition of the plaintiff denies each and every allegation set forth and contained in said petition.

Said defendant further states that if it were true that the said J. B. Stout was charged by complaint made before John W. McMillan, United States Commissioner with the crime of adultery in the United States Court for the Central District of the Indian Territory at McAlester, and his bail *is* said case being fixed at the sum of $750.00, and that the defendant, The Southern Surety Company did make and execute a bond unto the United States of America as obligee in the said sum of $750.00, wherein and whereby it was stipulated and expressed that the said J. B. Stout should personally appear before the said United States Court for the Central District of the Indian Territory at McAlester, on the 1st day of November, 1907 term thereof and from term to term thereafter till finally discharged by said court, and then and there abide the further orders of said court, and not depart therefrom without leave thereof, conditioned that if the said J. B. Stout should not so appear, abide and remain, then the said bond should be forfeited and the said amount paid to the United States of America, a copy of which bond, marked "Exhibit A" is attached to the petition of the plaintiff, then
29 in that event the plaintiff would not be entitled to recover in this action for the reason that the said J. B. Stout was never

indicted by the United States Court for the Central District of the Indian Territory at McAlester, and that he was never called upon to answer in said court, and that his said bond was never forfeited in said court, and this defendant incurred no liability thereunder.

Defendant further denies that upon the admission of the State of Oklahoma into the Union upon November 16th, 1907, the said State of Oklahoma had imposed upon her the duty of prosecuting the alleged crime of adultery against the said J. B. Stout; denies that the said State of Oklahoma succeeded to the rights of the United States as obligee in said bond; denies that afterward upon January 8th, 1908, an indictment was returned in the District Court of Pittsburg County, Oklahoma against the said J. B. Stout on the charge of adultery; denies that thereafter upon March 11th, 1909, the said cause — called for trial in said District Court of Pittsburg County, Oklahoma, and that the said J. B. Stout failed to appear and answer but made default, whereupon a forfeiture of said bond, — declared taken and adjudged.

Wherefore, having fully answered this defendant prays that plaintiff take nothing by its suit, and that the defendant have and recover its cost herein expended.

J. E. WHITEHEAD,
Attorney for Defendant So. Surety Company.

30 Thereafter upon the 4th day of December 1909, the said cause coming on to be heard the State of Oklahoma, through T. R. Dean, elected to take a non-suit as to defendant, J. B. Stout, and the State and the defendant, Southern Surety Company, each announcing ready for trial, the cause was by consent submitted to the Court and a jury waived, whereupon the State of Oklahoma, to sustain the allegations of its petition, introduced the following testimony, to-wit:

31 In the District Court in and for Pittsburg County, State of Oklahoma, October Term, 1909.

No. —.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Transcript of Proceedings Had at the Trial of the Above Styled Cause on December 4, 1909, before Honorable Preslie B. Cole, Judge Presiding.

Appearances:

T. R. Dean, County Attorney, Pittsburg County, Okla., on behalf of State of Oklahoma.
J. E. Whitehead, on behalf of Southern Surety Company.

It is agreed by and between the parties that a jury may be waived and the cause tried before the court, the court sitting as a jury.

Mr. Dean: The plaintiff offers in evidence the bond sued on, executed October 10, 1907, by the defendant, J. B. Stout, with the Southern Surety Company as co-defendant of J. B. Stout and the same may be marked Exhibit A and made a part of the record.

Mr. Whitehead: The Southern Surety Company objects to the introduction of this paper in evidence for the reason that it purports to be a bond executed by the Southern Surety Company as surety to the United States of America whereby they undertake to
32 produce the body of J. B. Stout in the United States Court for the Central District of the Indian Territory at McAlester; for the further reason that the Southern Surety Company has never contract- to produce the defendant, J. B. Stout in any of the State Courts of Oklahoma. They further object to the introduction of the bond in evidence until it is first shown that a forfeiture was taken upon this bond in the United States Court for the Central District of the Indian Territory.

Judge Cole: Did you allege in your petition that you brought this suit in the name of the State, ex rel, you as County Attorney?

Judge Dean: Comes the State of Oklahoma, plaintiff in the above entitled cause by T. R. Dean, County Attorney.

Judge Cole: Do you allege that it was filed in the State Court from the United States Court, the said court being the successor of the United States Court.

Mr. Dean: Yes sir.

Judge Cole: Do you allege a forfeiture?

Mr. Dean: Yes, sir.

Judge Cole: The bond will be admitted presuming that you will follow it up with proof that a forfeiture was taken.

Mr. Dean: We can begin at the other *end* if necessary.
33 Judge Cole: It may be admitted with that understanding.
Mr. Whitehead: We except to the introduction of the bond.

Mr. Dean: The plaintiff offers in evidence an indictment as the indictment found and returned into this court against the defendant J. B. Stout and filed on January 8, 1908.

Judge Cole: That is since Statehood isn't it.

Mr. Dean: Yes, sir. And ask that the same be marked Exhibit B and become a part of the record.

Mr. Whitehead: The defendant, the Southern Surety Company objects to the introduction of the Indictment in evidence for the reason that the District Court of Pittsburg County in which court the indictment was found had no jurisdiction of the crime of adultery committed by the defendant, J. B. Stout, prior to Statehood; that the Statute punishing the crime of adultery which was in force prior to Statehood was repealed upon the admission of the State of Oklahoma into the Union, and that for this reason the prosecution against the defendant, J. B. Stout would abate.

Judge Cole: Objection overruled. It may be admitted.

Mr. Whitehead: Exceptions saved.

Mr. Dean: The plaintiff now offers in evidence the record of this

court, made on the 11th day of March, 1908, in criminal
34 cause number 6260, styled, State of Oklahoma vs. J. B. Stout, defendant herein, showing that a forfeiture was taken, showing that the defendant, J. B. Stout, in said criminal cause failed to answer when his case was called for trial in this court, and that a forfeiture upon the bond sued upon herein was taken, and which may be marked Exhibit C and made a part of the record.

Judge Cole: On what date.

Mr. Dean: On the 11th day of March, 1908.

Judge Cole: The court will take cognizance of its own records.

Mr. Whitehead: The defendant, the Southern Surety Company objects to the introduction of the record in evidence for the reason that the District Court of Pittsburg County had no jurisdiction of said offense, the same being, if an offense at all, an offense against the United States of America and not against the State of Oklahoma, and that the State Court would therefore have no jurisdiction to forfeit the said bond, and that for the further reason that the bond upon its face shows that it is conditioned for the appearance of the said defendant, J. B. Stout in the United States Court for the Central District of the Indian Territory and not in the District Court of Pittsburg County, Oklahoma.

Judge Cole: Objection overruled.

Mr. Whitehead: Exceptions saved.

Mr. Dean: You will admit that no part of the bond had
35 been paid, neither the bond or any part thereof?

Mr. Whitehead: Yes, sir.

Mr. Dean: We rest.

Mr. Whitehead: The defendant, the Southern Surety Company now demurs to the evidence of the State for the reason that — has not made a prima facie case.

Judge Cole: The demurrer will be overruled.

Mr. Whitehead: Exceptions saved.

Judge Cole: The Court holds that under the Enabling Act and the Constitution this Court became successor to the United States Court for the Central District of the Indian Territory, and successors to all its records, bonds judicial acts and proceedings, and for which reason the demurrer will be overruled.

Mr. Whitehead: Exceptions saved.

D. J. TATUM, being called as a witness on behalf of the defendant, the Southern Surety Company, after having been first duly sworn, testified as follows:

Direct examination by Mr. Whitehead:

Q. State your name to the Court.
A. D. J. Tatum.
Q. You hold any official position?
A. Yes, sir, Deputy Sheriff.
Q. How long have you been Deputy Sheriff?
36 A. I don't know, a little over two years.
Q. Do you know J. B. Stout?

A. Yes, I have seen him.
Q. When was the last time you ever saw him?
A. I don't know just how long ago it has been, quite a while though.
Q. Do you know where he is now?
A. No sir.
Q. I will ask you if you had him under arrest the last time you saw him?
A. Yes sir.
Q. What did you do with him?
A. I didn't do nothing with him, let him run off was all.
Q. He escaped from you?
A. Yes sir.
Q. You haven't seen him since?
A. No sir.

Judge Cole:

Q. You didn't let him get away intentionally?
A. No sir.
Q. You done everything you could to hold him?
A. Yes sir. I was more or less careless, I was too careless was now come him to get away, I let him walk in a store to see a merchant about making his bond, and I taken my eye off him and he ran out the back door.
Q. It was not your intention to let him get away?
A. No sir, never.

Cross-examination by Mr. Dean:

Q. On which charge did you have him in your custody?
A. The whiskey charge.
Q. Charged with violating the prohibition law of the State
37 of Oklahoma?
A. Yes, sir.

Judge Cole:

Q. The last you heard of him he was running?
A. Yes sir, the last I heard of him he was running.
Q. You think he is still running?
A. He had on awful heavy boots, probably he has run down by now.

Mr. Whitehead:

Q. When was this Mr. Tatum he got away from you?
A. February, 1908.

Witness excused.

Mr. Whitehead: We close.
Mr. Dean: We close.

STATE OF OKLAHOMA,
Pittsburg County:

I, Henry S. Cabell, Court Stenographer of the District Court in and for Pittsburg County, State of Oklahoma, do hereby certify that the above and foregoing seven pages of typewriting comprises a true, full and correct transcript of my short hand notes taken at the trial of the above entitled cause.

Witness my hand on this the 8th day of December, 1909.

HENRY S. CABELL,
Court Stenographer, Pittsburg County, State of Oklahoma.

38 *Recognizance to Appear Before Court.*

UNITED STATES OF AMERICA,
Indian Territory, Central District, ss:

Know all men by these presents, That we, J. B. Stout, as principal and Southern Surety Company as surety, are held and firmly bound unto the United States of America in the just and full sum of Seven Hundred and Fifty ($750.00) Dollars for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, by these presents.

In witness whereof, we have hereunto subscribed our hands and affixed our seals (using scroll for seals) this the 24th day of August, 1907.

Whereas, the above bounden, J. B. Stout stands charged by indictment in the United States Court in the Central District of the Indian Territory at McAlester, with the crime of adultery and introducing and disposing of whiskey, and has been arrested and is duly in custody under and upon said charge as aforesaid.

Now, the conditions of this obligation are such, that if the said J. B. Stout shall personally appear before the United States Court in the Central District of the Indian Territory aforesaid, at McAlester, in said District, on the first day of the next November, 1907, term thereof, and from term to term thereafter until finally discharged by said court, and then and there abide the further order of said Court and not depart therefrom without leave thereof, then this recognizance to be void; otherwise of force.

Signature of Principal and Sureties:

J. B. STOUT. [SEAL.]
SOUTHERN SURETY COMPANY, [SEAL.]
By F. D. UNGLES,
[SEAL.] *Agent and Attorney in Fact.*

Exhibit "A."

39 THE STATE OF OKLAHOMA,
Pittsburg County, ss:

In the District Court of the Fourth Judicial District of the State of Oklahoma, Held in and for Pittsburg County, in said State.

THE STATE OF OKLAHOMA
vs.
J. B. STOUT, Defendant.

Indictment.

At the January Term, a term of the District Court of the Fourth Judicial District of the State of Oklahoma, held in and for Pittsburg County, in the State of Oklahoma, at the City of McAlester, and begun on the 6th day of January, in the year of our Lord, 1908, the jurors of the Grand Jury of said county, good and lawful men, then and there returned, tried, empanelled, sworn and charged, according to law, to diligently inquire into, and true presentment make of, all public offenses against the said State of Oklahoma, do present and find that, in said County of Pittsburg, in said State of Oklahoma, on the 20th day of August, in the year of our Lord, One Thousand Nine Hundred and Seven, one J. B. Stout, did unlawfully and feloniously commit the crime of adultery by then and there having sexual intercourse with one Nancy Riddle, she the said Nancy Riddle being then and there a married woman, and not then and there being the wife of said J. B. Stout, and he, the said J. B. Stout being then and there a married man, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State of Oklahoma.

T. R. DEAN,
County Attorney in and for said County.

"Exhibit B."

40 Endorsed: No. 6260. Indictment. In the District Court of the Fourth Judicial District of the State of Oklahoma, held in and for Pittsburg County. The State of Oklahoma vs. J. B. Stout. Indictment for —. A True Bill. T. R. Dean, Foreman of the Grand Jury. Presented in open court, by the Foreman of the Grand Jury in the presence of Grand Jurors, and filed this 8th day of January, 1907. W. B. Riley, District Clerk. Witnesses examined before the Grand Jury: Nancy Riddle, J. R. Cassada, J. B. Dowell.

I, W. B. Riley, Clerk of the District Court hereby certify that the above and foregoing is a full, true and correct copy of the original indictment filed in my office.

Witness my hand and official seal this 31st day of January, 1908
[SEAL.] W. B. RILEY, *Clerk.*

41 10th Judicial Day, March, 1908, Term, Dated March 12th, 1908.

Number 6260.

STATE OF OKLAHOMA
vs.
J. B. STOUT.

Forfeiture Bond.

Comes now the above cause regularly on for trial the plaintiff being represented by T. R. Dean, County Attorney, and the defendant comes not thereupon he is three times loudly called to come into Court and save His Recognizance, but comes not and is in default. And now the Southern Surety Company, sureties upon defendant's bond are three times loudly called to come into court and bring with them the body of said defendant and save their Recognizance, and they and each of them come not but make default.

It is therefore considered, ordered and adjudged by the Court that the bond of defendant herein be and the same is hereby forfeited.

"Exhibit C."

42 The above and foregoing was all of the evidence offered by either the State or the Defendant.

43 Whereupon the Court rendered and pronounced judgment against the defendant, Southern Surety Company, in the sum of Seven Hundred and Fifty ($750.00) Dollars and cost, — which action of the court, defendant excepted, a copy of which judgment is as follows, to-wit:

In the District Court of Pittsburg County, State of Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Judgment.

On this, the 4th day of December, 1909, the same being one of the days of the regular October term of this Court, and court being in session and the above styled cause coming on for trial, as to defendant Southern Surety Company, and both parties having announced ready, and having waived the calling of a jury and agreed that the cause should be submitted upon proof to the court and tried by the court, and, both plaintiff and defendant, Southern Surety

Company being represented by counsel; whereupon testimony is offered by plaintiff and defendant, and the case being closed as to testimony, the court, being well and sufficiently advised in the premises, doth find the issues of fact in favor of plaintiff, and that plaintiff should recover and have judgment for the amount as alleged in its petition.

Wherefore, it is by the court, considered, ordered and adjudged that the plaintiff, the State of Oklahoma, have and recover of and from the defendant, the Southern Surety Company, the sum of Seven Hundred and Fifty ($750.00) Dollars, and all its costs herein expended.

PRESLIE B. COLE, *Judge.*

44 Thereafter upon December 7th, 1909, the defendant, Southern Surety Company, filed in said cause its motion for a new trial which motion is in wor-s and figures as follows, to-wit:

In the District Court of Pittsburg County, State of Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Motion for a New Trial.

Now comes the Southern Surety Company and prays the court to grant it a new trial in this cause and for grounds of said motion states:

(1) Because of errors of law accruing — the trial which were duly excepted to by this defendant.

(2) Because the judgment of the court is not supported by the evidence or by law.

(3) Because the court erred in admitting upon the trial of this cause irrelevant, incompetent, and immaterial testimony, in that the court permitted the State to offer over the objections of the defendant, the bond sued upon in this action, same being marked "Exhibit A" and the indictment marked "Exhibit B" returned against J. B. Stout, and a copy of the court record showing a forfeiture of the bond.

(4) That the court erred in overruling this defendant's demurrer to the evidence offered by the State.

(5) That the court erred in entering judgment against this defendant upon the proof adduced, the said proof failing to show the plaintiff's right to recover upon the proof adduced in this action.

Wherefore, Plaintiff prays that it be granted a new trial.

J. E. WHITEHEAD,
Attorney for Defendant So. Surety Co.

45 Thereafter upon the 14th day of January, 1910, said motion for new trial coming on to be heard was by the court

overruled, to which action of the court, defendant, Southern Surety Company duly excepted, a copy of which order and judgment of the court is as follows, to-wit:

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT et al., Defendants.

Now on this day comes on for hearing the motion heretofore filed by defendant, Southern Surety Company, for a new trial in this cause, and no one appearing, it is ordered by the court that said motion be, and the same is hereby overruled, to which ruling of the court, the defendant, Southern Surety Company, at the time duly excepted, and it is further ordered that defendant, Southern Surety Company be, and is hereby allowed sixty days in which to prepare, make and serve Case-made, and that Plaintiff be, and is hereby allowed ten days thereafter in which to suggest amendments to said case-made, said case-made to be settled and signed on five days' notice thereafter by either party, and it is further ordered that defendants, be and is hereby allowed until February 14th, 1910, inclusive, in which to file Appeal Bond herein, the amount of which bond is herein fixed by the Court in the sum of Sixteen Hundred ($1600.00) Dollars.

46 The above and foregoing Case-made contains a true and perfect copy of every pleading filed in said cause, a true and perfect copy of all evidence offered in the trial of said cause, and a true and perfect copy of all orders, rulings, judgments and decrees of the Court in the said cause.

In the District Court of Pittsburg County, State of Oklahoma.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Agreement of Attorneys.

It is hereby stipulated and agreed by and between the parties hereto, that the foregoing case-made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all the evidence offered and introduced, and the orders and rulings made, and exceptions allowed, and all the records upon which the judgment and journal entry in said cause were made, and the same is a full, true, complete and correct case-made; and the said plaintiff waives the right to suggest amendments to said case-made and hereby consents that the same may be settled immediately and without notice; and hereby joins in the request of the defendant that the Judge of said court settle the same and order the same certified to by the clerk of the District Court and file- according to law; and

the said defendant hereby waives the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.

Dated this 28th day of February, 1910.

T. R. DEAN,
County Attorney.
J. E. WHITEHEAD,
Attorney for Defendant.

Filed Dec. 3, 1910. W. H. L. Campbell, Clerk.

47 STATE OF OKLAHOMA,
Pittsburg County, ss:

I, T. R. Dean, County Attorney of Pittsburg County, Oklahoma, do hereby accept service on the above and foregoing Case-made in case Number 424, State of Oklahoma vs. J. B. Stout and Southern Surety Company, said service having been made upon me this 21st day of February, 1910.

T. R. DEAN,
County Attorney, Pittsburg County, Oklahoma.

48 In the District Court of Pittsburg County, State of Oklahoma.

Case No. 424.

STATE OF OKLAHOMA, Plaintiff,
vs.
J. B. STOUT and SOUTHERN SURETY COMPANY, Defendants.

Certificate of Judge.

This is to certify that the foregoing above case-made, and amendments thereto have been duly served in due time and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct and contains a true and correct settlement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such cause; and I hereby settle, allow, certify and sign the same as true and correct and hereby order that the Clerk of the District Court attest the same with the seal of said court, and file the same of record.

Witness my hand this the 10th day of March, 1910.

PRESLIE B. COLE.
District Judge.

Attest:
W. B. RILEY,
[SEAL.] *Clerk of District Court.*

49 Endorsements on back of case-made: 424. (Lower Court No.). 2162. (Supreme Court No.). State vs. Southern

Surety Co. Case-made. Filed Mar. 10, 1910. W. B. Riley, District Clerk. I. L. Hefley, Deputy. Filed Dec. 3, 1910. W. H. L. Campbell, Clerk.

50 In the Supreme Court of the State of Oklahoma.

No. 2162.

SOUTHERN SURETY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Defendant in Error.

Stipulation for Filing Briefs.

It is hereby stipulated and agreed by and between the Southern Surety Company, Plaintiff in error, and the State of Oklahoma, defendant in error, that the plaintiff in error may file its brief herein at any time within the next ten (10) days from the date hereof, and that the defendant in error may file its brief herein at any time within ninety (90) days after the date of the filing of brief on behalf of plaintiff in error, each of said respective parties hereby mutually waiving any and all objections to the filing of said briefs within the said time.

Dated and signed at McAlester, in Pittsburg County, Oklahoma, on this 24th day of May, 1912.

SOUTHERN SURETY COMPANY,
Plaintiff in Error,
By J. E. WHITEHEAD,
Its Attorney of Record.
THE STATE OF OKLAHOMA,
By ROBERT TARTER,
County Attorney of Pittsburg County, Oklahoma.

Endorsed: No. 2162. In the Supreme Court of the State of Oklahoma. Southern Surety Company, Plaintiff in Error, vs. The State of Oklahoma, Defendant in Error. Stipulation for Filing Briefs. Filed May 27, 1912. W. H. L. Campbell, Clerk. (Allowed.)

51 And thereafter, to-wit, on the 4th day of June, 1912, the following proceedings in the Supreme Court were had.

Supreme Court, May Term, 1912, June 4th, 1912, Eighth Judicial Day.

#2162.

SOUTHERN SURETY CO., Plaintiff-in-Error,
vs.
STATE OF OKLAHOMA, Defendant-in-Error.

And now on this day it is ordered by the court that the stipulation that plaintiff in error have ten days' additional time in which to file

brief, and defendant in error have ninety days after plaintiff in error files brief, to file answer brief, be, and the same is hereby allowed.

52 And thereafter, to-wit: on the 10th day of September, 1912, the following proceedings in the Supreme Court were had.

Supreme Court, September Term, 1912, September 10", 1912, First Judicial Day.

#2162.

SOUTHERN SURETY CO., Plaintiff-in-Error,
vs.
STATE OF OKLAHOMA, Defendant-in-Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

53 And thereafter, to-wit: on the 15th day of October, 1912, the following proceedings in the Supreme Court were had.

Supreme Court, September Term, 1912, October 15th, 1912, Sixteenth Judicial Day.

#2162.

SOUTHERN SURETY CO., Plaintiff-in-Error,
vs.
STATE OF OKLAHOMA, Defendant-in-Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein. And the court having considered the same finds that the judgment of the lower court in the above case should be affirmed.

Opinion by Robertson, C.

By the Court: It is so ordered, the above opinion is hereby adopted in whole, and judgment is entered accordingly.

54 In the Supreme Court of the State of Oklahoma, Supreme Court Commission, Division No. One.

Filed Oct. 15, 1912. W. H. L. Campbell, Clerk.

No. 2162.

SOUTHERN SURETY COMPANY, Plaintiff-in-Error,
vs.
THE STATE OF OKLAHOMA, Defendant-in-Error.

Syllabus.

1. The Supreme Court will not review alleged errors of the trial court, unless the errors complained of are in some manner assigned for review by the petition in error.

2. Adultery, being an offense arising out of the marriage relation, is cognizable only in the state courts, the power to legislate on that subject not being one delegated by the State to Congress or reserved by the Constitution to the Federal Government, except in the Territories, forts, arsenals, custom houses, or other place where the United States has exclusive jurisdiction, in which places Congress may pass laws, defining the offense and prescribing the punishment.

3. Prior to the admission of Oklahoma into the Union as a State, the crime of adultery in the Indian Territory was an offense against the federal statute, for that all of Indian Territory was under the immediate and exclusive jurisdiction of the United States, but by virtue of the provisions of the Enabling Act, all persons charged with the crime of adultery, at the time of statehood and whose cases were then pending in the United States Courts of the Indian Territory, were thereafter properly prosecuted in the district courts of the state, unless the offense had been committed in some part of the Indian Territory over which the federal government retained exclusive jurisdiction, in which case it would be properly triable in the federal courts.

4. Under the provisions of the Enabling Act, the State of Oklahoma became subrogated to all rights, powers and privileges of the United States in all the cases that were properly transferred from the United States Courts of the Indian Territory to the courts of the State of Oklahoma, and especially to the rights of the original obligee in criminal appearance bonds.

5. A surety on a forfeited criminal appearance bond, given in the Indian Territory prior to statehood, will not be heard, in an action to recover on said bond, on account of forfeiture taken, to object to the substitution of the State of Oklahoma for the United States, the original obligee named in the said bond, said substitution being authorized by the terms of the Enabling Act.

55 Error from the District Court of Pittsburg County.

Preslie B. Cole, Judge.

Action by the State of Oklahoma Against Southern Surety Company to Recover on Forfeited Appearance Bond.

Judgment for the State. Defendant Appeals. Affirmed.

J. E. Whitehead, for Plaintiff in Error.
No Appearance, for Defendant in Error.

ROBERTSON, *C.:*

In 1907, prior to statehood, J. B. Stout was held, by a United States Commissioner, to await the action of the grand jury at the November 1907 term of the United States Court for the Central District of the Indian Territory, at McAlester, on two charges, one for introducing whiskey into the Indian Territory, and the other for the crime of adultery. His bail was fixed at $750.00 and was furnished by the plaintiff in error. On January 8th, 1908 he was indicted by the grand jury of Pittsburg County for the crime of adultery. At the March 1907 term of the District Court of Pittsburg County, he was called for arraignment, and failing to appear, a forfeiture on the bond was taken, and on January 23d, 1909, plaintiff in error brought suit against Stout and the Surety Company to recover on the forfeited bond. No service being had on Stout the trial proceeded against the Surety Company, and resulted in a judgment in favor of the State for the full amount sued for. The Surety Company appeals. By its petition in error the Surety Company seeks the review of several rulings of the trial court, but inasmuch as the consideration of all but one of the assignments of error requires an examination of the evidence introduced at the trial, and no exception, or objection to the overruling of the motion for a new trial is alleged or pleaded, and no error being assigned thereon in the petition in error, it will be unnecessary to give them fur-
56 ther attention as this court can not review alleged errors, unless the same are presented by the petition in error.

"The Supreme Court will not review alleged errors in the trial court, unless the error complained of is in some manner assigned for review by the petition in error." Lookabaugh vs. Epperson, 28 Okla. 472. 114 Pac. 738.

"Where appellant fails to assign in his petition in error, as error, the overruling of a motion for a new trial, no question that seeks to have reviewed the errors alleged to have occurred during the progress of the trial in the court below, is properly presented to the Supreme Court, and such can not be reviewed." Meyer vs. James, 29 Okla. 7: 115 Pac. 1016.

The only error, therefore, arising on the record, which we are warranted in considering is that one mentioned in the fourth assignment of error, viz:

"That the lower court erred in overruling the demurrer filed by the defendant below, to the original petition of plaintiff below."

Four separate grounds of demurrer are urged by plaintiff in error, viz:

"First. That this court had no jurisdiction to indict the defendant, J. B. Stout, for an offense committed prior to the admission of the State of Oklahoma into the Union.

"Second. That this court had no jurisdiction to forfeit said bond as alleged in plaintiff's petition.

"Third. That this court had no jurisdiction of this cause of action against this defendant, or the said J. B. Stout.

"Fourth. That the petition of the plaintiff does not state facts sufficient to constitute a cause of action against the defendant."

Plaintiff in error contends that the offense of adultery in the Indian Territory prior to statehood was cognizable only under the Federal Statutes, and an examination of the laws in force in the Indian Territory prior to the admission of Oklahoma into the Union, discloses the fact that the laws of Arkansas which had been
57 put in force in the Indian Territory, made no provision for the punishment of the crime of adultery, but that such offense was prosecuted under and by virtue of the so called "Edmunds-Tucker" Act, (24 Stat. L. 635) and the amendments thereto as passed by Congress, and approved March 3d, 1887.

The prosecution of Stout was begun and carried on under and by virtue of this Federal Statute. This being true, was the cause properly transferred to the District Court of Pittsburg County as the successor of the United States Court for the Central District of the Indian Territory?

Section 16 of the Enabling Act, as amended by Congress, and approved March 4th, 1907, provides for the transfer of pending cases to the Federal Courts in the following language:

"Prosecutions for all crimes and offenses committed within the Territory of Oklahoma, or in the Indian Territory, pending in the district courts of the Territory of Oklahoma, or in the United States Courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a State, would have been cognizable in the Federal courts, shall be transferred to and be proceeded with in the United States circuit or district court established by this Act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a State."

While Section 20 of the same Act makes provision for the transfer of all other pending cases to the State courts, which succeeded the U. S. Courts of the two Territories. Under these statutes it appears that this cause, which was pending in the United States Court at the advent of statehood, was properly transferred to the District Court of Pittsburg County. Congress undoubtedly had authority to enact laws for the government of the Indian Territory, which would define and punish the crime of adultery; for this purpose the "Edmunds-Tucker" Act was sufficient, and it extended to all

places where the United States had, or retained, exclusive jurisdiction, which, prior to statehood, included every place in
58 the Indian Territory, and which, since statehood, still extends to forts, arsenals, custom houses, etc., if any such places there be in that part of the state. But unless there be some such place, where the United States retains and exercises exclusive jurisdiction, the above act does not apply and prosecutions for its violation can not be carried on in Federal Courts since statehood, for the reason that adultery, being an offense arising out of the marriage relation, is cognizable only in the state courts, the power to legislate on that subject being one not delegated to Congress by the States, nor reserved by the Constitution of the United States to the Federal Government. The power of Congress to deal with this subject in the Territories, and in those reservations, etc. in the various states, where Congress has reserved exclusive jurisdiction, can not be doubted. Congress might also have saved the right and jurisdiction to the Federal Courts to hear and determine all such cases as were pending at the time of the admission of Oklahoma and Indian Territory to statehood, but for reasons deemed sufficient, did not do so, but by specific provision of statute (Secs. 16 & 20 Enabling Act) provided for the transfer of such cases to the District Courts of the State, which would have had original jurisdiction of the subject matter had there been a state in existence at the time the alleged crime was committed.

Counsel for the Surety Company strenuously insist that the rule laid down by Judge Marshall in United States vs. Baum, 74 Fed. 43, should govern in this case, and at first reading one might agree that such was the law in this case, but a careful investigation and examination of the law, and especially by comparing the controlling sections of the Enabling Acts of the two states, we can readily see that the right to prosecute such cases was reserved and saved
59 to the Federal Courts in Utah, while in this state express provision was made for the surrender of jurisdiction and for the transfer of such cases to the State Courts. Had our Enabling Act failed, by express provision, to provide for the removal of such cases to the State Courts then under the same reasoning as used by Judge Marshall, the Federal Courts might have retained jurisdiction of this particular case. Sections 16 and 20 of the Enabling Act provided that this case should be transferred to and disposed of by the District Court of Pittsburg County, and the demurrer was properly overruled.

There is no merit to the further contention of plaintiff in error that the State of Oklahoma is not the proper party plaintiff in this action for the reason that the United States of America was the obligee named in the bond sued on. By the provisions of Section 19 of the Enabling Act it was provided:

"That the courts of original jurisdiction of such state shall be deemed to be the successor of all courts of original jurisdiction of said Territories, and as such shall take and retain custody of all records, dockets, journals and files of such courts except in causes transferred therefrom as herein provided, etc."

So that by virtue of the foregoing, the District Court of Pittsburg County became vested with all the powers of the United States Court for the Central District of the Indian Territory so far as this case was concerned. Under the foregoing provisions of the Enabling Act, the State became and was subrogated to all the rights, powers and privileges of the United States, the original obligee, named in the bond, besides, in our opinion, the plaintiff in error is in no position to raise the question of the so called legislative assignment of the obligation sued on, nor of the substitution of the state as obligee instead of the United States of America. By virtue of the
60 provisions of the Enabling Act, supra, the United States is the only party that could raise that objection.

This disposes of all questions properly raised by the petition in error, and no error appearing of record sufficient to warrant a reversal, the judgment should be affirmed.

Oct. 15, 1912 by the court adopted in whole.

61 UNITED STATES OF AMERICA,
State of Oklahoma, ss:

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing pages, numbered from 1 to 61, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of the Southern Surety Company, Plaintiff in Error, vs. The State of Oklahoma, Defendant in Error, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Oklahoma City in the State of Oklahoma, on this 20" day of February, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court
of the State of Oklahoma.
By JESSIE PARDOE, *Deputy.*

62 In the Supreme Court of the State of Oklahoma.

No. 2162.

SOUTHERN SURETY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Defendant in Error.

I, the undersigned Attorney and Counselor at Law, hereby enter my appearance as Attorney for the Southern Surety Company, plaintiff in error in the above cause, under the authority contained in the instrument in writing, executed by *by* the said Southern Surety Company, plaintiff in error, attached hereto and filed herewith.

C. S. ARNOLD.

Filed Feb. 20 1914. W. H. L. Campbell, Clerk.

63 In the Supreme Court of the State of Oklahoma.

No. 2162.

SOUTHERN SURETY COMPANY, Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA, Defendant in Error.

Whereas, heretofore, to-wit: on October 14, 1912, the above entitled court rendered a decision in the above entitled cause affirming the decision of the lower court therein, and against the undersigned Southern Surety Company, plaintiff in error, the said decision being adverse to the rights and privileges claimed by said plaintiff in error under the Federal Constitution and laws of the United States.

Whereas, the said plaintiff in error desires to prosecute its appeal to the Supreme Court of the United States to obtain the decision of the said Supreme Court of the United States in said cause, and for such relief as he believes himself entitled to and for the correction of the errors of the above Court.

Now, therefore, the said Southern Surety Company, a corporation, the plaintiff in error herein, does hereby authorize and empower C. S. Arnold, Attorney and Counselor at Law, to represent it and its interests and to appear for said corporation as its Attorney and Counselor for all the purposes necessary and requisite to obtaining a writ of error to the said Supreme Court of the United States and to do all things necessary to obtain a final decision of said Court in the said cause.

64 In Witness Whereof the said Southern Surety Company, a corporation, has hereunto signed its corporate name, by its Vice President thereunto duly authorized, attested by its Secretary, and affixed its corporate seal on this 13 day of February, 1914.

[Seal Southern Surety Company, Oklahoma. Incorporated 1907.]

SOUTHERN SURETY COMPANY,
By J. H. HUCKLEBERRY,
Vice-President.

Attest:

——— ———.

65 [Endorsed:] No. 2162. In the Supreme Court of the State of Oklahoma. Southern Surety Company, Plaintiff in Error, vs. The State of Oklahoma, Defendant in Error. Power of Attorney and Entry of Appearance of Attorney for Plaintiff in Error. Filed Feb. 20, 1914. W. H. L. Campbell, Clerk.

Endorsed on cover: File No. 24,158. Oklahoma Supreme Court. Term No. 124. Southern Surety Company, plaintiff in error, vs. The State of Oklahoma. Filed April 11th, 1914. File No. 24,158.

Office Supreme Court, U. S.
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DEC 6 1915
JAMES D. MAHER
CLERK

(24,158)

In the Supreme Court of the United States

October Term, 1915

Southern Surety Company,
Plaintiff in Error,

vs.

The State of Oklahoma,
Defendant in Error.

No. 124

In Error to the Supreme Court of the State of Oklahoma

BRIEF OF PLAINTIFF IN ERROR.

C. S. Arnold,
McAlester, Oklahoma,
Attorney for Plaintiff in Error.

Oklahoma Law Brief Company, 130 W. Third St., Oklahoma City.

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In the Supreme Court of the United States

October Term, 1915

Southern Surety Company,
Plaintiff in Error,

vs.

The State of Oklahoma,
Defendant in Error.

No. 124

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS

Prior to statehood, in the year 1907, one J. B. Stout was bound over by a United States Commissioner at McAlester, in the Central District of the Indian Territory, to await the action of the grand jury at the November term, 1907, of the United States Court for the Central District of the Indian

Territory, at McAlester, upon two charges, the one for *introducing whisky into the Indian Territory* and the other for the crime of *adultery*. His bail was fixed by the Commissioner in the sum of $750.00. This bail he furnished with the Southern Surety Company, plaintiff in error herein, as his surety. (See Bail Bond Record 25 and 38.)

Stout was not indictel in the United States Court prior to statehood but, after statehood and in the District Court of Pittsburg County, Oklahoma, an indictment was returned against him for the crime of *adultery*, said indictment being returned and presented upon January 8, 1908. (See Indictment, Record 39.)

Thereafter, in the District Court of Pittsburg County, Oklahoma, defendant Stout was called for arraignment upon said indictment, at the March, 1908, term, and, failing to appear, a forfeiture was by said court taken upon the bond. (See Record page 41.)

Thereafter, on January 23, 1909, the State of Oklahoma, plaintiff below, filed its suit against the said Stout and the Southern Surety Company, plaintiff in error herein, to collect the said bond, and after dismissing the suit as to Stout, recov

ered judgment against this plaintiff in error for the amount of said bond (Record 43). Plaintiff in error appealed from the said judgment to the Supreme Court of the State of Oklahoma where the judgment of the trial court was affirmed (Record 53 & 54) and from which judgment of the Supreme Court of the State of Oklahoma plaintiff in error prosecutes this appeal to this court by writ of error, seeking to reverse the judgment of the Supreme Court of the State of Oklahoma and likewise the judgment of the District Court of Pittsburg County.

Assignments of Error.

I.

The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of the Enabling Act, Section 16 (34 Stat. L. 1286 as amended by act of Congress approved March 4, 1907, Ch. 2911) and Section 20 (34 Stat. L. 1287 as amended by the act of Congress approved March 4, 1907 Ch. 2911), a prosecution for the crime of adultery committed in the Indian Territory before statehood in violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amendments) was, when Oklahoma was admitted into the Union, properly transferred to and proceeded with in a district court of the State of Oklahoma. The validity of the authority exercised by the District Court of the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to Section 1 of Article III of the Constitution of the United States, and in contravention of Section 711 of the Revised Statutes of the United States.

II.

The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of Section 16 of the Enabling Act (34 Stat. L. 1286

as amended by the act of Congress of March 4, 1907, Ch. 2911), a grand jury empanelled by a district court of the State of Oklahoma had authority and jurisdiction to indict a person for a violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amendments) committed in the Indian Territory before statehood. The validity of the authority exercised by the said district court of the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to Section 1 of Article III of the Constitution of the United States, and in contravention of Section 711 of the Revised Statutes of the United States.

III.

The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of the Enabling Act, Section 16 (34 Stat. L. 1286 as amended by act of Congress approved March 4, 1907, Ch. 2911) and Section 19 (34 Stat. L. 227) and Section 20 (34 Stat. L. 1287 as amended by act of Congress approved March 4, 1907, Ch. 2911), a district court of the State of Oklahoma had authority to declare a forfeiture of a criminal appearance bond given to the United States of America as obligee and taken and approved by a

Commissioner of a United States Court in the Indian Territory before statehood, and which bound the principal in said bond to appear before a United States Court to answer for a violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amendments) committed in the Indian Territory before Statehood. The validity of the authority exercised by the said district court of the State ot Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to Section 1 of Article III of the Constitution of the United States, and in contravention of Section 711 of the Revised Statutes of the United States.

IV.

The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of the Enabling Act, Section 19 (34 Stat. L. 227) a district court of the State of Oklahoma had authority to hear and determine a suit brought by and in the name of the State of Oklahoma, as plaintiff, against the Southern Surety Company, plaintiff in error, as defendant, upon a criminal appearance bond given to the United States of America as obligee and which was taken and approved by a Commissioner of a United States Court in the

Indian Territory before statehood, said Southern Surety Company, plaintiff in error, being a surety thereon, and which bond bound the principal therein to appear before a United States Court to answer for a violation of the Edmunds-Tucker Act (24 Sta. L. 635 and amendments), to-wit, adultery, committed in the Indian Territory before statehood. The validity of the authority exercised by the said district court of the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to Section 1 of Article III of the Constitution of the United States, and in contravention of Section 711 of the Revised Statutes of the United States.

V.

The Supreme Court of the State of Oklahoma erred in holding and deciding that, under the terms of Section 19 of the Enabling Act (34 Stat. L. 227), the State of Oklahoma at statehood became subrogated to all rights, powers and privileges of the United States as original obligee in a criminal appearance bond given to the United States of America as obligee and taken and approved by a Commissioner of a United States Court in the Indian Territory before statehood, and which bound the prin-

cipal in said bond to appear before a United States Court to answer for a violation of the Edmunds-Tucker Act (24 Stat. L. 635 and amendments), to-wit, adultery, committed in the Indian Territory before statehood. The validity of the authority exercised under the State of Oklahoma in the premises was denied and drawn in question by the plaintiff in error on the ground of its being repugnant to the Fourteenth Amendment to the Constitution of the United States in that it deprives the plaintiff in error of its property without due process of law; also on the ground of its being repugnant to Section 10 of Article 1 of the Federal Constitution in that it impairs the obligations of contracts; also on the ground of its being repugnant to the provisions of Section 1 of Article III of the Federal Constitution.

VI.

The Supreme Court of the State of Oklahoma erred in affirming the judgment and decree of the trial court rendered in said cause and in refusing to give and denying to plaintiff in error the rights afforded and protection given it under the Federal Constitution and Acts of Congress aforesaid.

ARGUMENT.

This bond is a contract and its terms cannot be altered or changed by legislation or otherwise without the consent of the parties.

It will be seen, by reference to the bail bond, that plaintiff in error, defendant below, undertook and agreed by a solemn contract entered into by and between plaintiff in error as surety and the United States of America as obligee, to produce the body of Stout in the United States Court for the Central District of the Indian Territory. The terms of this contract could not be changed by subsequent legislation so as to bind the surety thereon. This surety did not undertake to produce the body of the defendant Stout in the District Court of Pittsburg County, Okla. Stout has never yet been called in the United States Court for the Central District of the Indian Territory, neither has he been called in the United States District Court for the Eastern District of Oklahoma, and no indictment against him has been returned in either of said Federal courts. *There has been no failure on the part of plaintiff in error to produce the body of Stout at the place and at the time agreed to in the said bail bond,* hence the verdict of the lower court should have been in favor of plaintiff in error.

If this bond could be assigned by legislation to the state then many rights and advantages of the surety under the bond would be taken away.

In the case at bar, brought by the state in a state court, the action was dismissed as to the defendant Stout because service of summons could not be obtained upon him (Record 30). Process of the state court is not valid outside of the boundaries of the state, yet had this action been brought by the United States in a federal court, as the surety on the bond relied on when the same was executed, the defendant could have been served with process wherever he might be found in the United States, and judgment obtained against him, and this defendant subrogated to all rights of the United States under the judgment. This is an important and valuable prerogative which is enjoyed only on bonds in which the United States is obligee, and which are enforced by the United States, and is a protection which is in no manner afforded by the laws of Oklahoma, and a relief which cannot be given by a state court, and was an inducement to this surety to go upon the bond. The federal statute upon this subject reads as follows:

> "Whenever the principal in any bond given to the United States is insolvent, or whenever,

such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent of deceased principal as is secured to the United States; and may bring and maintain a suit upon the bond, in law or equity, in his own name, for the recovery of all moneys paid thereon." Rev. St. U. S. 2d Ed. 3468.

Every word of this statute was a part and parcel of the contract entered into between plaintiff in error and the United States as fully as if the same had been written into the instrument itself. And the burden does not lie upon plaintiff in error to show that an injury has been sustained by reason of the loss of these rights and privileges—it is enough that its position has been changed without its consent. However, in the case at bar, merely to state the change in the position of plaintiff in error as a party to the contract sued on is to demonstrate that the change is to the great disadvantage of plaintiff in error and one that,

could it have been foreseen, would have beyond question prevented the plaintiff in error from executing the bond.

> "All writs of execution upon judgments obtained for the use of the United States, in any court thereof, in one state may run and be executed in any other state, or in any territory, but shall be issued from, and made returnable to, the court wherein the judgment was obtained."
>
> Rev. St. U. S. 2d Ed. 986.

Under the above provision of the federal statutes, the United States of America, as plaintiff in action on the bond in a federal court, after recovering judgment, could have levied execution against property of the defendant Stout in any part of the whole United States the same could be found in, and plaintiff in error would have been subrogated to the same right upon paying the judgment to the United States. This is also a privilege that the state is totally unable to afford, although plaintiff in error had a right to rely on it and did rely on it when executing the bond sued on. Furthermore, limitation never runs against the government and this surety being subrogated to this judgment in favor of the government limitation would never bar the claim. Thus this surety could go

through the process of subrogation in a federal court and obtain judgment against the principal without the trouble or expense of sueing him in a far-away state. Upon this judgment, so recovered, process would run co-extensive with the boundaries of the United States, even to Alaska and the Philippine Islands and the judgment would never become barred, whereas, if this legislation is valid and the bond and its obligations could be and were transferred to the State of Oklahoma, this surety could not be subrogated but would have to go to a far-away state and sue the principal upon the bond. Its process would only run co-extensive with the state where the suit was brought and the judgment would become barred within the statutory time. Hence legal, valuable and vested rights would be swept away from this surety without due process of law, and in violation of the Federal Constitution.

The beneficiary under this bond could not be changed by legislation, nor could there be a legislative assignment of the bond from the United States to the State of Oklahoma.

A bail bond is not an assignable contract and any attempted assignment thereof is a material al-

teration. The rule is thus defined in Stearn's Law of Suretyship, page 64:

> "A guaranty is special when it is addressed to a particular person, firm or corporation, and when so addressed only the promisee named in the instrument acquires any rights under it.
>
> "The very strict rules of construction of written instruments which prevent parol proof to vary their recitals will not be relaxed even to correct a mistake in the name of the promisee so as to enable some other person than the one named in the instrument to maintain the action."

The Supreme Court of the United States, in the case of *Reese* v. *United States*, 9 Wallace 13, 19 L. Ed. 541, which is a leading case on the subject, states the rule as follows:

> (Syllabus) "Liability of sureties on a recognizance is limited to the precise terms of their contract."
>
> "Any change in the contract made by the principals, without the assent of the sureties, discharges them; nor does it matter how trivial the change, or even that it may be of advantage to the sureties."
>
> (From opinion) "If, now, we apply the ordinary and settled doctrine, which controls the liabilities of sureties, it must follow that the sureties on the recognizance in suit are discharged. * * *"
>
> "It is true the rights and liabilities of sure-

ties on a recognizance are in many respects different from those on ordinary bonds or commercial contracts. The former can at any time discharge themselves from liability by surrendering their principal and they are discharged by his death. The latter can only be released by payment of the debt or performance of the act stipulated. But in respect to the limitations of their liability to the precise terms of their contract, and the effect upon such liability of any change in those terms without their consent, their positions are similar. And the law upon these matters is perfectly well settled. Any change in the contract, on which they are sureties, made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. They have a right to stand upon the very terms of their undertaking."

The case has been quoted and cited many times in the courts of the United States, and the rule of construction enunciated therein applies peculiarly to the bond sued on in this case as it is a bond filed in a United States court, running to the United States and binding the principal to appear in a United States court.

"Sureties are said to be favorites of the law, and a contract of suretyship must be

> strictly construed to impose upon the surety only those burdens clearly within its terms, and must not be extended by implication or presumption. This rule is followed both at law and in equity. Construction in favor of the surety should not, however, be carried to the length of giving the contract a forced and unreasonable construction with the view of relieving him.
>
> "The validity of the contract and the liability of a surety are governed by the law of the state in which the contract is entered into. The liability of a surety is determined also by the law in force at the time his contract is made" (32 Cys. 73).

The bond is conditioned for the payment of $750.00 to the United States of America, and not to the State of Oklahoma, and for the production of Stout in the Federal Court and not in the State Court. It is now a binding obligation under seal to the United States of America, and if the State of Oklahoma is now permitted to collect this sum it will not in any wise discharge the obligation of plaintiff in error to the United States of America. The manner in which this obligation may be remitted and discharged is controlled entirely by federal statutes and is not a matter within the jurisdiction of any court of the State of Oklahoma, or within the authority of any officer of said state.

The Enabling Act contained no provision that

the State of Oklahoma should succeed to the rights of the United States under bonds running to the United States in its courts in the Indian Territory, and no section of the Enabling Act will, even by implication, sustain this proposition. Section 19 of the Enabling Act provides:

> "That the courts of original jurisdiction of such state shall be deemed the successor of all courts of original jurisdiction of said territories and as such shall take and retain custody of all records, dockets, journals, and files of such courts except in causes transferred therefrom, as herein provided; * * *"

This section relates merely to the *custody* of the records of the United States courts, after statehood.

Section 20 of the Enabling Act provides:

> "That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory or in the United States courts in the Indian Territory, at the time said territories become a state, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be proceeded with, held and determined by the courts of said state the successors of said district courts of the Territory of Oklahoma and the United States courts in the Indian Territory; with the right to prosecute appeals or etc. * * *"

Under the provisions above quoted the bond sued upon was transferred to and filed with the

clerk of the District Court of Pittsburg County, Oklahoma, through a misunderstanding and misconception of the law applying to the case, but the bond itself was still and is owned by the United States solely and the mere fact that it was filed in the state court did not *per se* constitute an assignment of the interest of the United States in the bond. In other words, jurisdiction of the suit on the bond and the right to sue on the bond as obligee are entirely separate and distinct propositions.

There is a vast difference between bonds running to the Territory of Oklahoma and bonds running to the United States of America. The Territory of Oklahoma ceased to exist when it was merged into a state, but the United States government did not cease to exist and did not become incapable of enforcing its obligations and contracts. The State of Oklahoma is a continuation of the temporary government known as the Territory of Oklahoma but the United States was and is a separate and distinct sovereignty.

That this fact was known and recognized by the framers of the Constitution of Oklahoma is

shown by Section 3 of the Schedule of the Constitution, which reads as follows:

> "All debts, fines, penalties, and forfeitures which have accrued or may hereafter accrue to the Territory of Oklahoma shall inure to the State of Oklahoma, and may be sued for and recovered by the state."

Section 7 of the Schedule of the Constitution provides also:

> "All property, real and personal, credits, claims, and choses in action, belonging to the Territory of Oklahoma at the time the state is admitted into the Union, shall be vested in and become the property of the State of Oklahoma."

All actions to recover penalties and forfeitures accrued or accruing to the Territory of Oklahoma are founded upon these provisions of our constitution, but where is a similar provision applying to penalties accruing to the United States? Is it not a self-evident proposition that the principle was understood and recognized by the constitutional convention that no action of the State of Oklahoma could divest the United States of title to any debts, fines, penalties and forfeitures?

Section 27 of the Constitution of Oklahoma provides:

> "All cases, civil and criminal, pending, at

the time of the admission of the state into the Union, in the district courts of the Territory of Oklahoma, in any county within the district, and the records, papers, and proceedings of said district court and the seal and other property appertaining thereto, shall be transferred into the district court of the State for such county, except as is provided in the Enabling Act of Congress, and all cases, civil and criminal, pending at the time of the admission of the State in the Union, in the United States Court for the Indian Territory, within the limits of any county created in whole or in part within the limits of what was heretofore the Indian Territory, and all records, papers, and proceedings of said United States courts for the Indian Territory, and the seal and other property appertaining thereto, shall be transferred to the District Court of the State for such county, except as is provided in the Enabling Act of Congress and the amendments thereto: Provided, That the Legislature may provide for the transfer of any such cases from one county to another county."

As a matter of fact, the case at bar was not a pending action when Oklahoma was admitted into the Union and is, therefore, not within the provisions of the above sections of the Constitution of the State and of the enabling act passed by Congress. See authorties *post.*

If the case against Stout had been a pending case at the time the State was admitted to the Union it would not have been transferrable to the

state court because it was a prosecution under the Edmunds-Tucker Act, a general Federal Statute, applicable to all territories of the Union the same as post office or a national bank case, a strictly Federal offense. But the trial court seems to have proceeded upon three erroneous theories: (1) That the Stout case was a pending case; (2) that the criminal case to be instituted after statehood against Stout was by the Enabling Act and the State Constitution transferred before its birth to the state court; and (3) that the transfer of the criminal case was also an assignment of the bond, the undertaking executed by plaintiff in error to the United States of America. It is therefore proper to examine these sections and determine if they will bear this construction. It is nowhere provided that the state shall be entitled to enforce purely civil contracts owned by the United States and be entitled to all the benefits thereunder, after such contracts have been transferred and filed in the state courts.

It is a well known fact that when causes are transferred from a state court to a federal court under the laws of the United States governing such transfers, all undertakings and bonds filed in the state courts continue in full force and effect after

they have been transferred to the federal court, but the terms, conditions and parties obligated remain unaffected by such transfer, and the jurisdiction of an action to enforce a bond that has been transferred is controlled by the ordinary laws concerning the jurisdiction of state and federal courts.

So far as we have been able to discover there are no acts of Congress or provisions of our State Constitution other than those hereinbefore quoted, that bear on the matter of the transfer of civil and criminal causes from the United States Court in the Indian Territory to state courts at statehood, and we have looked in vain for the law under which the state in this case claims the benefits under the obligation of plaintiff in error to the United States.

That the District Court of Pittsburg County, Oklahoma, had no jurisdiction of the offense named in the bond and for which he was indicted by said court, and consequently could not forfeit the said bond.

All of the above argument has been made under the assumption that the District Court of Pittsburg County, Oklahoma, had jurisdiction of

the offense mentioned in the bond, and for which Stout was indicted by a grand jury in the said court. However, such is not the facts. A want of jurisdiction must be apparent upon an examination of the case and the law applicable thereto.

If the District Court of Pittsburg County, Oklahoma, had no jurisdiction of this offense, then the indictment was and is absolutely void and all proceedings in said court were and are absolutely void and insufficient in law to base an action for the forfeiture of the bond upon, and the criminal action against Stout should have been begun and carried on in the United States District Court for the Eastern District of Oklahoma instead of in a state court, when the Indian Territory became a state.

The offense of adultery was, prior to statehood, prosecuted under the Revised Statutes of the United States (24 U. S. Statutes at Large 635). See 1 Supplement Revised Statutes of the United States, c 397, p. 568, or Carter's Indian Territory Statutes, Sec. 4651. *Adultery was strictly a federal offense*, the same as a violation of the postal laws or of the National Banking Act, and while this proposition may seem anomalous, it is explained, historically, by the fact that Congress passed this

law in order to place the prosecution of adultery and bigamy and kindred offenses in the Territory of Utah in the hands of federal officers and to take them out of the hands of the territorial authorities who, on account of their allegiance to the Mormon Church, were not disposed to suppress these crimes. The law was, however, made applicable to all territory under the exclusive jurisdiction of the United States, and it has never been repealed and is still in force in all parts of the world which are under the exclusive jurisdiction of the United States.

When the Territory of Utah became a state, its Enabling Act was practically identical with the Oklahoma Enabling Act with reference to the transfer of criminal prosecutions pending in the territorial courts to United States courts and to courts of the State of Utah.

See Utah Enabling Act *post*.

Under the provisions of this act all prosecutions for the crime of adultery were transferred to the United States courts after Utah became a state. The question as to whether prosecutions for the crime of adultery begun before statehood and pending at statehood in Utah were properly cognizable in courts of the United States or in courts of the State of Utah was tested in the case of *United*

States v. *Baum*, 74 Federal 43 C. C. A., in which case the United States Circuit Court held as follows:

"1. JURISDICTION OF FEDERAL COURTS—ADMISSION OF TERRITORIES — PENDING CAUSES — ADULTERY IN UTAH.

"Adultery committed in Utah prior to its admission as a state, being a crime against the United States, a prosecution therefor pending in a territorial court at the time of admission was transferable, under the provisions of the Enabling Act (28 Stat. 111) and the schedule annexed to the State Constitution (article 24 S. 7) to the proper United States Circuit Court.

"2. SAME—CONSTITUTIONAL LAW.

"The government of the United States retains constitutional power to punish, through its courts, a crime committed against it in one of the territories, although such territory is admitted as a state pending the prosecution, and before conviction.

"3. .....

"4. SAME—PLACES SUBJECT TO EXCLUSIVE FEDERAL JURISDICTION.

"It seems that the Edmunds-Tucker act is still in force in the State of Utah, at any place therein over which the United States retains exclusive jurisdiction. *U. S.* v. *Cornell*, Fed. Cas. No. 14867, 2 Mason 60, followed.

"Opinion:

" 'The defendant asks that this action be dis-

missed on the ground that the law under which he was indicted ceased to operate when Utah was admitted as a state, or, as stated in the motion "was repealed by the admission of Utah to statehood," and that there is no law in the United States now in force in Utah making the act charged against him a crime, or authorizing its punishment. On November 21, 1895, the defendant was indicted in one of the district courts of the then Territory of Utah for the crime of adultery, charged to have been committed on the 25th of September, 1895, in said Territory, and within the jurisdiction of the court. To this indictment the defendant pleaded not guilty, and it was pending in such district court when Utah became a state. The crime af adultery was defined, and its punishment prescribed in Section 3 of the Act of Congress of March 3, 1887, commonly known as the Edmunds-Tucker Act. 24 Stat. 635. It was by that act made a crime against the United States, not only in the territories, but in any other place over which the United States had exclusive jurisdiction. As the court in which this indictment was found has ceased to exist, it becomes important to consider how the process could survive the court in which it was initiated, and could be proceeded with in this court.

"Section 17 of the Utah Enabling Act (28 Stat. 111) enacted:

" 'That the convention herein provided for shall have the power to provide, by ordinance, for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the Territory of Utah, at the time of the admission of the said state into the

Union, to such courts as shall be established under the constitution to be thus formed, or to the Circuit or District Court of the United States for the District of Utah; and no indictment, action or proceeding shall abate by reason of any change in the courts, but shall be proceeded with in the state or United States courts according to the law thereof, respectively.'

"Under this authority it was provided, in a schedule annexed to the Constitution of Utah, that:

" 'All actions, causes, proceedings and matters which shall be pending in the district courts of the Territory of Utah, at the time of the admission of the state into the Union, whereof the United States Circuit or District Courts might have had jurisdiction had there been a state government at the time of the commencement thereof, respectively, shall be transferred to the proper United States Circuit and District Courts, respectively, and all files, records, indictments and proceedings relating thereto, shall be transferred to said United States courts.'

"Const. Utah, Art. 24, Sec. 7.

"That the circuit court would have had jurisdiction of the crime charged if Utah had been a state at the time of its commission, and it had been committed under the same circumstances—that is, at any place within the state over which the United States had exclusive jurisdiction—follows from the original grant of criminal jurisdiction to that court in the judiciary act of 1789, which has been reenacted in the succeeding statutes defining its jurisdiction. This grant was of "exclusive

cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. Rev. St. U. S., Sec. 629, 25 Stat. c 866, Sec. 1.

"This is not one of the crimes that could have been proceeded with in a state court, because the offense was against the United States, and not against the state; and the courts of the former are given exclusive cognizance of all offenses against the national government. It is evident that when Congress exercises its exclusive powers of legislation for the territories, it is not as a local legislature. The authority is conferred by the same instrument that is the source of its other powers; and, in the language of the Supreme Court of the United States in *Cohens* v. *Virginia*, 6 Wheat. 426, it is to be exercised 'like all its other powers, in its high character as the legislature of the Union.' It would seem, then, that the enabling act, and the ordinance adopted by its authority, have made this court the sucessor of the territorial court as to this case, and that process initiating in the latter court could be proceeded with here, provided there be any authority to now punish the defendant for the crime charged. But it is contended that the power to punish in this case has ceased, because Utah was admitted as a state on the same footing as the other states, and, as claimed, the United States is without constitutional power to make criminal the act charged in the indictment, if now committed in Utah; and hence it has lost the power to punish the defendant for it. If the act would

not constitute a crime against the United States if now committed, it would not follow that the power to punish it was lost. There seems to be no objection, in principle, to punishing under a statute which makes an act criminal when committed within a particular time, although such punishment be not inflicted until the expiration of that time. *Stevens* v. *Dimond*, 6 N. H. 330; Bishop St. Crimes, c. 182. It is true that no punishment can be inflicted for an act after the repeal, without a saving clause, of the law prohibiting it and prescribing its punishment; but this is because there would remain no law in existence authorizing the court to proceed. As stated in *U. S.* v. *Tynen*, 11 Wall. 95:

"'By the repeal, the legislative will is expressed that no further proceedings be had under the act repealed. In *Norris* v. *Crocker*, 13 How. 429, the court said that "as the plaintiff's right to recover in that case depended entirely upon the statute, its repeal deprived the court of jurisdiction of the subject." As said by Mr. Justice Taney in another case, "the repeal of the law imposing the penalty is, of itself, a remission."'

"This is as true of repeals by implication, as of other repeals, but it is not necessary that the act charged as criminal should continue to be prohibited. The crime is complete as of the date of the criminal act, and, unless there be a remission, by the repeal of the only law which authorizes its punishment or by direct pardon, such punishment may be inflicted. This is shown by the admittedly valid statutes of the United States, and of most of the states, to the effect that

such a repeal in criminal cases should not affect causes of prosecution already accrued. Rev. St. U. S., c. 13. Wherever there is such general saving clause, or a similar special saving clause in the repealing act, the authority to punish is still preserved, and the intent, otherwise inferable, that the repeal should operate as a remission of past offenses, is negatived.

"But it is said that Congress had no constitutional power to save the right to punish this offense after Utah became a state, unless it had the power to make the act criminal if thereafter committed in Utah. No authority is cited in support of this claim, and I have been able to find none. It is predicated upon the theory that, in order to punish a crime against its laws, the United States must retain its sovereignty over the place where the crime was committed, in respect to the subject-matter of the crime. But the power to punish crime is independent of any territorial sovereignty over the place of its commission. The United States 'has jurisdiction of all offenses which assail its rights or the rights of its subject, without regard to the place where the offender was at the time the offense was committed. The real theory of jurisdiction rests on the ground that the act or omission was against the sovereignty. The rule should be that we will punish all who offend against our sovereignty, if we can obtain control of the offender, without any regard to his nationality, or the place of the offense; and in this view rests true national protection.' Brown Jur. 224, 2 Whar. Cr. Lat. Sec. 1862; *Ex parte Bollman*, 4 Cranch, 75; *U. S.* v. *Thompson*, 1 Summ. 168 Fed. Cas. No. 16492.

"Having the constitutional power to prohibit the act and prescribe a punishment, the United States retains the power to inflict such punishment independent of the continued exercise of absolute, or, indeed, of limited sovereignty over the place of the commission of the offense. The jurisdiction of consular courts of the United States rests on this principle. Having the power to prescribe the offense, Congress had the power to authorize the punishment of the offender at such time and place as it might designate, within or without a state; so that, if it be admitted that the law under which this indictment was found has been repealed by implication, with respect to Utah, still the power to punish past offenses under it is saved both by the express language of Section 13, Rev. St. U. S. and by the intent to save pending prosecutions shown in Section 17 of the Utah Enabling Act. But is the law in question repealed? It was not enacted for Utah alone, but for all of the territories and other places over which the United States had exclusive jurisdiction. The Utah Enabling Act could not affect this law outside of this state, nor did it, in, terms, remove Utah from its operation. This argument is that statehood for Utah is so inconsistent with any operation of this law within the state as to repeal it by implication. The Constitution provides that Congress shall have power to exercise exclusive legislation in all cases whatsoever * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock yards and all other needful buildings.' Const. Art 1, Sec. 8, Subd. 17. Such places, when acquired,

would be other places over which the United States has exclusive jurisdiction, and would fall within the field of operation of the Edmunds-Tucker act. The fact that Utah is a state is in no way inconsistent with the operation of the law in such places.

"In *United States* v. *Cornell*, 2 Mason 60, Fed. Cas. No. 14,867, this principle was applied to a murder committed in a fort in Newport Harbor, belonging to the Federal Government. The ground had been purchased with the consent of Rhode Island, and it was held that the state had no jurisdiction, and that the United States was the only power that could take cognizance of and punish the crime. So it would seem that there is still a legitimate field of operation in Utah for the statute in question. The act charged as a crime against the defendant, if now committed in the State of Utah, under the same circumstances as charged in the indictment, viz: if committed in any place in the state over which the United States has exclusive jurisdiction, would be a crime against the United States, and punishable as such.

"The motion must be denied."

It appears to us that this case settles the question as to whether or not the District Court of Pittsburgh County, Oklahoma, had jurisdiction of the offense of adultery charged against the defendant, Stout. The Utah Baum case is exactly parallel with the criminal case against Stout.

It is a significant fact that prosecutions for

felonies and misdemeanors of a local nature in the Territory of Utah were carried on in the name of the *People* of Utah, while crmies deemed to be against the United States wer carried on in the name of the United States of America. Thus it is we find that the case of *People* v. *Berlin*, 35 Pac. 498, is a prosecution for grand lareeny; *People* v. *Kessler*, 44 Pac. 97, is a prosecution for murder; *People* v. *Burtleson*, 47 Pac. 87, is a prosecution for maintaining a nuisance; the said causes all being prosecuted by the Territory of Utah prior to statehood; but on the other hand we find that prosecutions for the crime of adultery in Utah prior to statehood were invariably carried on in the name of the United States, and upon the United States side of the Territory courts.

The relation of the Territory of Utah to the United States of America was fully expressed by Chief Justice Zane of the Supreme Court of the Territory in the case of *Marte* v. *Ogden City St. Ry. Co.*, 35 Pac. 501, in the following words:

> "The lines separating national and state powers are drawn by the National Constitution and laws and by state constitutions and laws. The right of the United States to acquire territory carries with it the power to govern the people found upon it. The Federal

Government, however, has employed this right directly to govern the people of the organized territories but little further than it was authorized under the constitution and laws of the United States to make and apply its laws to the people of the United States in the various states or in other words to the people of the States. The National Government has made provision for a territorial government in Utah, and has delegated to it a very large portion of powers similar to those exercised by state governments over their people. While this territorial organization is not a sovereignty, its authority to make laws, as we have stated, extends to all rightful subjects of legislation consistent with the Federal constitution and the laws of the National legislature and the will of the people of the territory, expressed by their legislature in laws, has the same effect upon the people that the will of the people of a state, expressed through its legislature, has upon its people by similar laws. National laws emanate from the people of the United States, and are expressed by Congress, while territorial laws proceed from the people of the territory, and are expressed by their legislature. The Federal Government prescribes duties and requires the services of its citizens as officers, jurors and witnesses, and in its fee bill fixed their compensation, and the territorial government prescribes duties and requires the services of its residents as officers, jurors, or witnesses, and in the territorial fee bill in question, has fixed their compensation. But the United States marshals and prosecuting attorneys and clerks of the Supreme and District Courts in the territories discharge duties under the laws of the United

States and under the territorial government as well, and the courts of the latter have jurisdiction of and try cases under both Federal and territorial laws. * * *"

The laws of the State of Arkansas made by Congress applicable to the *Indian Territory did not denounce the crime of adultery and adultery was prosecuted solely under the same act of Congress in the Indian Territory as it was in the Territory of Utah.* Would it be less a strictly Federal offense in the Indian Territory, an unorganized Indian country, than it was in the Territory of Utah, an organized territory? The Indian Territory had no local law against adultery, the Territory of Utah did have such a law but it was superseded by the Act of Congress. Had the Indian Territory been an organized territory before statehood the result would be exactly the same, Stout would have been prosecuted on the Federal side of the Territorial court and the case against him would have been properly transferrable to the United States District Court for the Eastern District of Oklahoma under the terms of the enabling Act and the constitution of Oklahoma.

If the offense of adultery is now committed upon territory within the State of Oklahoma exclusively under the jurisdiction of the United

States, such as a United States fort or arsenal, the crime is still punishable under the same Act of Congress that Stout was charged with violating. The State of Oklahoma would have no jurisdiction of this offense and any action taken by a state court in assuming such jurisdiction would be *coram non judice.*

We believe that the absolute test as to whether a criminal case should be transferred to a state court or to a United States court after statehood in Oklahoma, is this: If the crime charged is one in violation of an Act that has no application outside of the Indian Territory or Oklahoma, then the proceedings should have been transferred to a state court; but if the crime charged is one in violation of an Act of Congress having general application over all territory under the exclusive jurisdiction of the United States, then it is a strictly Federal offense and the proceedings should be transferred to the proper United States court. We insist that the language of the enabling Act with reference to transferring proceedings in territorial and Indian Territory courts has precisely this meaning, and that it was the manifest intention of Congress to relinquish the jurisdiction of the United States over offenses that concerned

only the people of the new State of Oklahoma, but that the jurisdiction of United States courts over offenses against laws that govern all the citizens of the United States should remain unaffected.

Applying this rule to the case at bar, the following conclusions are inevitable: That the criminal case against Stout for adultery should have been started and carried on in the United States District Court for the Eastern District of Oklahoma, instead of in the District Court of Pittsburg County, Oklahoma, and that the latter court never acquired any jurisdiction of the matter, and that all proceedings in said court were *coram non judice*. *A fortiori*, no valid indictment was ever returned against Stout and, consequently, no forfeiture could be had of the bond sued on.

The state court had no jurisdiction of the case because the crime was committed prior to statehood, was an offense against the United States and could not be transferred to the state courts by Act of Congress.

Pickett v. *United States*, 216 U. S. 456, 54 L. Ed. 566.

The Oklahoma enabling Act was approved June 16, 1906 (34 Stat. at L. 267, Chap. 3335);

November 16, 1907, the state was admitted into the Union (35 Stat. at L. 2160).

The Oklahoma enabling Act, approved June 16, 1906, provided:

> "Sec. 13. That said State when admitted as aforesaid shall constitute two judicial districts, to be known as the Esatern District of Oklahoma and the Western District of Oklahoma; the said Indian Territory shall constitute said Eastern District, and the said Oklahoma Territory shall constitute said Western District. The circuit and district courts for the Eastern District shall be held one term at Muskogee, one term at Vinita, one term at Tulsa, one term at South McAlester, one term at Chickasha, and one term at Ardmore, each year, and the circuit court and district courts of the Western District shall be held one term at Guthrie, one term at Oklahoma City, and one term at Enid, and one term at Lawton, each year, for the time being. And the said districts shall, for judicial purposes, until otherwise provided, be attached to the Eighth Judicial Circuit. There shall be appointed for each of said districts one district judge, one United States attorney, and one United States marshal. There shall be appointed a clerk for each of said districts, who shall keep his office at Muskogee and Guthrie, respectively, for the time being. The regular term of said courts shall be held at the places designated in this Act, at Muskogee on the first Monday in January and at Vinita on the first Monday in March and at Tulsa on the first Monday in April; at South McAlester on the first Mon-

day in June; at Ardmore on the first Monday in October; at Chickasha on the first Monday in November; at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Enid on the first Monday in June, and at Lawton on the first Monday in October, in each year, and one grand jury shall be summoned in each year in each of said circuit and district courts. The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney and clerk of each of the circuit and district courts of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in other districts of the United States; and that the laws in force in the Territory of Oklahoma as far as applicable, shall extend over and apply to said state until changed by the legislature thereof.

"Sec. 14. That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed and all prosecutions for crimes or

offenses committed before the passage of this Act, in which indictments have not yet been found, or proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed.

"Sec. 15. That all appeals or writs of error taken from the Supreme Court of Oklahoma Territory, or the United States Court of Appeals in the Indian Territory to the Supreme Court of the United States or the United States Circuit Court of Appeals for the Eighth Circuit, previous to the final admission of such state shall be prosecuted to final determination as though this Act had not been passed. And all cases in which final judgment has been rendered in such Territorial Appellate Courts which appeals or writs of error might be had except for the admission of such state may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States Circuit Court of Appeals under the provisions of existing laws, and there held and determined in like manner, and in either case the Supreme Court of the United States, or the United States Circuit Court of Appeals, in the event of reversal, shall remand the said causes to either the State Supreme Court or other final appellate court of said state, or the United States Circuit and District Courts of said states, as the case may require: Provided, That the time allowed by existing law for appeals and writs of error from appellate courts of said territories shall not be enlarged hereby, and all appeals and writs of error not sued out from the final judgments of said courts at the time

of the admission of such state shall be taken within six months from such time.

"Sec. 16. That all causes pending in the Supreme and District Courts of Oklahoma Territory and in the United States courts and in the United States Court of Appeals in the Indian Territory arising under the constitution, laws, or treaties of the United States, or affecting ambassadors, ministers, or consuls of the United States, or of any other country or state, or of admiralty or of maritime jurisdiction, or in which the United States may be a party, or between citizens of the same state claiming lands under grants from different states; and in all cases where there is a controversy between citizens of said territories prior to admission and citizens of different states, or between citizens of different states, or between a citizen of any state and citizens or subjects of any foreign state or country and in which cases of diversity of citizenship there shall be more than two thouand dollars in controversy exclusive of interest and costs, shall be transferrable to the proper United States Circuit or District Court for final disposition: Provided, That said transfer shall not be made in any case where the United States is not a party except on application of one of the parties in the court in which the cause is pending, at or before the second term of such court, after the admission of said state, supported by oath, showing that the case is one which may be transferred, the proceedings to effect such transnfer, except as to time and parties, to be the same as are now provided by law for removal of causes from a state court to a Circuit Court of the United States; and

in causes transferred from the appellate courts of said territories the Circuit Court of the United States in such state shall first determine such appellate matters as the successor of and with all the power of said territorial appellate courts, and shall thereafter proceed under its original jurisdiction of such causes. All final judgments and decrees rendered in such circuit and district courts in such transferred cases may be reviewed by the Supreme Court of the United States or by the United States circuit court of appeals in the same manner as is now provided by law with reference to existing United States circuit and district courts."

"Sec. 17. That all cases pending in the Supreme Court of said Territory of Oklahoma and in the United States court of appeals in the Indian Territory not transferred to the United States circuit and district courts in said State of Oklahoma shall be proceeded with, held, and determined by the Supreme or other final appellate court of such state as the successor of said Territorial supreme court and appellate court, subject to the same right to review upon appeal or error to the Supreme Court of the United States now allowed from the supreme or appellate courts of a State under existing laws. Jurisdiction of all cases pending in the courts of original jurisdiction in said Territories not transferred to the United States circuit and district courts shall devolve upon and be exercised by the courts of original jurisdiction created by said state."

"Sec. 18. That the Supreme Court or other court of last resort of said State shall be deemed to be the successor of said Territorial

appellate courts and shall take and possess any and all jurisdiction as such, not herein otherwise specifically provided for, and shall receive and retain the custody of all books, dockets, records, and files not transferred to other courts, as herein provided, subject to the duty to furnish transcripts of all book entries in any specific case transferred to complete the record thereof."

"Sec. 19. That the courts of original jurisdiction of such state shall be deemed to be the successor of all courts of original jurisdiction of said Territories and as such shall take and retain custody of all records, dockets, journals, and files of such courts except in causes transferred therefrom, as herein provided; the files and papers in such transferred cases shall be transferred to the proper United States circuit or district court, together with a transcript of all book entries to complete the record in such particular case so transferred."

"Sec. 20. That all cases pending in the district courts of Oklahoma Territory and in the United States courts for the Indian Territory at the time said Territories become a State not transferred to the United States circuit or district courts in the State of Oklahoma shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma and United States courts for the Indian Territory, with the right to prosecute appeals or writs of error to the supreme court of said state, and also with the same right to prosecute appeals of writs of error from the final determination in said causes made by the supreme court of said State of

Oklahoma to the Supreme Court of the United States as now provided by law for appeals and writs of error from the Supreme Court of a State to the Supreme Court of the United States."

"Sec. 21. That the constitutional convention may by ordinance provide for the election of officers for a full state government, including members of the legislature and five representatives to Congress, and shall constitute the Osage Indian Reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the legislature of Oklahoma, and designate the county seat thereof, and shall provide rules and regulations and define the manner of conducting the first election for officers in said county. Such state government shall remain in abeyance until the state shall be admitted into the Union and the election for State officers held, as provided for in this Act. The state legislature, when organized, shall elect two senators of the United States, in the manner now prescribed by the laws of the United States, and the governor and secretary of said state shall certify the election of the Senators and Representatives in the manner required by law; and said Senators and Representatives shall be entitled to be admitted to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States. And the officers of the state government formed in pursuance of said constitution, as provided by said constitutional convention, shall proceed to exercise all the functions of such state officers; and all

laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said States as elsewhere within the United States."

The Act of March 4, 1907 (34 Stat. at L. 1286, chap. 2911), amended Secs. 16, 17 and 20 of the Oklahoma enabling act so as to read as follows:

"Sec. 16. That all civil causes, proceedings, and matters pending in the supreme or district courts of Oklahoma Territory, or in the United States courts or United States court of apeals in the Indian Territory, arising under the constitution, laws or treaties of the United States, or affecting ambassadors, ministers, or consuls of the United States, or of any other country or state, or of admiralty, or of maritime jurisdiction, or in which the United States may be a party, or between citizens of the same state claiming lands under grants from different states; and all cases where there is a controversy between a citizen of either of said Territories prior to admission and a citizen of any State, or between a citizen of any State and a citizen or subject of any foreign state or country, in which case of diversity of citizenship there shall be more than two thousand dollars in controversy, exclusive of interest and costs, shall be transferred to the proper United States circuit or district court established by this Act, for final disposition, and shall therein be pro-

ceeded with in the same manner as if originally brought therein; provided, That said transfer shall not be made in any such case where the United States is not a party, except on application of one of the parties, in the court in which the cause is pending; at or before the second term of such court after the admission of said State, supported by oath, showing that the case is one which may be so transferred. The proceedings to effect such transfer, except as to time and parties, shall be the same as are now provided by law for the removal of causes from a state court to a circuit court of the United States. Cases transferred from appellate courts shall go to the circuit courts of the United States in such state, which courts, for the purpose of hearing such cases, are hereby vested with all the powers of such territorial appellate courts. If the circuit court shall affirm the judgment, it shall, if the case be one then originally cognizable in the district court, remand it to that court for carrying into effect the judgment of the trial court; but if the case be one then originally cognizable in the circuit court it shall carry into effect the judgment of the trial court. If the circuit court shall reverse the judgment, it shall, if the case be one then originally cognizable in the district court, remand the case to that court for a new trial; but if the case be one originally cognizable in the circuit court, it shall set the case down for a new trial therein. All final judgments and decrees rendered in such circuit and district courts in such transferred cases, may be reviewed by the Supreme Court of the United States, or by the United States circuit court of appeals, in the cases and in the same manner as is now provided by law with reference to the judg-

ments and decrees of the existing United States circuit and district courts.

"Prosecutions for all crimes and offenses committed within the Territory of Oklahoma or in the Indian Territory, pending in the district courts of the Territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a state, would have been cognizable in the Federal Courts, shall be transferred to and be proceeded with in the United States circuit or district court established by this Act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a state.

"Prosecutions for all such offenses committed within either of said Territories and pending in the Supreme Court of the Territory of Oklahoma, or in the United States Court of Appeals in the Indian Territory, upon admission of such Territories as a State, shall be transferred to the United States Circuit Courts created by this Act for the district within which the offense was committed, which courts are hereby vested with the same jurisdiction to hear such cases as is now vested in the appellate courts of such Territories. Upon the affirmance or reversal by the circuit court of a judgment in any such case, like proceedings shall be had, and like appeals and writs of error allowed, as is provided in this section of this Act in civil cases."

"Section 17. That all causes, proceedings and matters, civil or criminal, pending in the Supreme Court of the Territory of Oklahoma,

or in the United States Court of Appeals in the Indian Territory, not transferred to the United States circuit or district courts in said State of Oklahoma shall be proceeded with, held, and determined by the supreme court of other final appellate court of such state as the successor of said Supreme Court of the Territory of Oklahoma and of the United States court of appeals in the Indian Territory, subject to the same right to review upon appeal or writ of error to the Supreme Court of the United States now allowed from the supreme or final appellate court of a state under existing laws."

"Sec. 20. That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said Territories become a State not transfered to the United States circuit or district courts in the State of Oklahoma, shall be proceeded with, held and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States courts in the Indian Territory; with the right to prosecute appeals or writs of error to the supreme or appellate court of said state, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such State to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a State to the Supreme Court of the United States. All criminal cases pending in the United States courts in the Indian Territory, not trans-

ferred to the United States circuit or district courts in the State of Oklahoma shall be prosecuted to a final determination in the state courts of Oklahoma under the laws now in force in that Territory."

The constitution of the State of Oklahoma provides as follows:

"Sec. 26. All cases, civil and criminal, pending, upon admission of the State into the Union, in the Supreme Court of the Territory of Oklahoma, on appeal or writ of error from the district or probate courts of any county or subdivision within the limits of the State, and the papers, records, proceedings, and seal of said court, shall be transferred to the Supreme Court of the State, except as is otherwise provided in the Enabling Act of Congress and all cases civil and criminal pending, on the admission of the state into the Union of the United States Court of Appeals for the Indian Territory and the papers, records and proceedings of said court shall be transferred to the Supreme Court of the State, except as is otherwise provided in the Enabling Act of Congress and the amendments thereto."

"Sec. 27. All cases, civil and criminal, pending, at the time of the admission of the State into the Union, in the district courts of the Territory of Oklahoma, in any county within the district, and the records, papers, and proceedings of said district court, and the seal and other property appertaining thereto, shall be transfered into the district court of the State for such county, except as is provided in the Enabling Act of Congress, and all cases, civil and criminal, pending, at the

time of the admission of the State into the Union, in the United States Court for the Indian Terrtory, within the limits of any county created in whole or in part within the limits of what was heretofore the Indian Territory, and all records, papers, and proceedings of said United States courts for the Indian Territory, and the seal and other property appertaining thereto, shall be transferred to the district court of the state for such county, except as is provided in the Enabling Act of Congress and the amendments thereto; provided, that the legislature may provide for the transfer of any such cases from one county to another county.

"Sec. 28. The terms and provisions of an an Act of Coongress entitled 'An Act to amend Section 16, 17 and 20 of and Act entitled "An Act to enable the people of Oklahoma and Indian Territory to form a Constitution and State Government and to be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states,"' are hereby accepted, and the jurisdiction of the cases enumerated therein is hereby assumed by the courts of the state."

(It will be noted throughout the above provisions of the Constitution of the State of Oklahoma and of the Enabling Act passed by Congress that provision is made for the trial of all *pending* cases and no provision is made for cases not

pending. No provision is made for the prosecution of crimes committed over which there is no pending case.)

Pickett v. *United States, supra,* (216 U. S. 456, 54 L. Ed. 566). Pickett, after statehood, was indicted in the District Court of the United States for the Western District of Oklahoma, charged with murder, alleged to have been committed within the limits of the Osage Indian Reservation prior to statehood. Pickett claimed that the jurisdiction to try him was in the State court, and not in the Federal court; but this contention was not sustained by this court. The holding was, that under the 14th section of the Enabling Act, all crimes against the United States, for which prosecutions were pending in the courts of Indian Territory or Oklahoma Territory, were, after statehood, tryable in the Federal court. It is believed to be impossible to distinguish the Pickett case from the case at bar. Both were committed in "Indian country," and prior to statehood.

The Supreme Court of the State in the case of *Coyle* v. *Smith,* 113 Pac. 944, has sought to distinguish the Pickett case from those occurring in the Indian Territory prior to statehood, upon

the idea that Section 31 of the Act of May 2, 1890 (26 Stat. L. 81) put in force in the Indian Territory certain laws of Arkansas, which were applicable only to the Indian Territory.

The thought in the mind of the State Supreme Court was, that where murder was committed in the Indian Territory, it was not a crime against the sovereignty of the United States—that murder in the Indian Territory was not a crime against the *general laws* of the United States—that Congress in legislating for the Indian Territory was not legislating as a sovereign, but was only acting as the agent of a future state, thereafter to be created in the Indian Territory. The language of the State court is:

> "Congress in enacting such special or local law by virtue of section 3, article 4, of the Constitution of the United States, is the agent of the sovereignty of the State in *futuro*, or, as has been said, in *uturo*—the womb of time."

We believe the State court has entirely misconceived the effect of the ruling of this court in the Pickett case. It is difficult to understand how Congress, in extending its *general* criminal laws over the Indian Territory, can be held to have been acting as the agent of a State, which at that time had not even a potential existence.

It is believed that the Supreme Court of the State was led into error in *assuming* that the statute against murder was put in force in the Indian Territory by virtue of Section 31 of the Act of May 2, 1890. That Act put in force in the Indian Territory certain general laws of the State of Arkansas, but the act against murder was not one of them. Neither was adultery one of them.

The subsequent Act of March 1, 1895 (28 Stat. L. 693) put in force in the Indian Territory certain provisions of the criminal laws of Arkansas, but it was expressly provided:

> "That in all cases where the laws of the United States and the said criminal laws of Arkansas have provided for the punishment of the said offenses, the laws of the United States shall govern as to such offenses, except for the crime of larceny; the punishment for which shall be that prescribed by the laws of the State of Arkansas. Any laws in force in said Territory to the contrary notwithstanding."

The statute against murder was in force in the Indian Territory, not by virtue of the Act of May 2, 1890, nor the Act of March 1, 1895, but by virtue of Section 2145 of the Revised Statutes, which expressly provided that:

> "The general laws of the United States as to the punishment of crimes committed in

> any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

It was expressly held in the Pickett case that the Federal statute against murder was the *general law* that prevailed in all places, under the exclusive jurisdiction of the United States, and that this general law was in force in the Osage Nation by virtue of Section 2145. At the time of the commission of the offense by the petitioner in January, 1907, the Indian Territory was "Indian country," and in no wise different from the Osage Nation, in so far as the meaning of the term "Indian country" is concerned.

It follows, therefore, that, inasmuch as murder and adultery are each an offense against a general law of the United States, and inasmuch as this general law is, by Section 2145, extended to all Indian country, an offense against this law is an offense against the general criminal statutes of the United States, whether it was committed in one of the Five Civilized Tribes of the Indian Territory or in any other Indian country. This being true, it necessarily follows that the decision of this court in the Pickett case sustains the contention of plaintiff in error that the state court

had no jurisdiction to try Stout's case or to forfeit his bond.

Judge Lurton in the Pickett case cites the cases of *Martin* v. *Hunter*, 304, and *U. S.* v. *Baum*, 74 Fed. 43, and the same doctrine had been held by the Supreme Court in a number of other cases.

In the case of *Guinn* v. *Breedlove*, 2 How. 29, where it was sought by peremptory motion, based upon statute of Mississippi, to recover a statutory penalty of the United States marshal for failure to pay over money collected upon execution, and where the statute had been adopted as a rule of practice in the Circuit Court of the United States, Justice Cabron says:

> "This being an offense against the State law, the courts of the state alone could punish its commission; the courts of the United States having no power to execute the penal laws of the individual states."

In the case of *Huston* v. *Moore*, 5 Wheaton 1, this court sustained a conviction had in the courts of Pennsylvania, based upon a statute of that state, which subjected the members of the militia to such punishments as had been prescribed by Congress. The conviction was sustained, however, not upon the idea that the state could try

for an offense against the Federal statutes, but because the offense was against the *laws of the State.*

Justice Johnston and Justice Story dissented in that case, and in the opinion of Justice Johnston, he says:

> "Crimes against a government are only punishable in its own courts, or in those which derive their right of holding jurisdiction from the offended sovereignty."

Justice Story in his opinion says:

> "It has been expressly held by this court that no part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated by Congress to State tribunals; and there is not the slightest inclination to retract that opinion. No concurrent power is retained by the states, because the subject-matter derives its existence from the Constitution; and the authority of Congress to delegate it cannot be implied, or it is not necessary or proper in any constitutional sense."

It is interesting to note that in the subsequent case of *Claflin* v. *Housman*, 93 U. S 130, Justice Bradley refers to these statements of Justices Story and Johnston, and says:

> "The court, perhaps, went further in that case than it would now."

It was held in the case of *Thompson* v. *Lok-*

ney, 134 U. S. 372, that the State courts had no jurisdiction to try a party for perjury committed in any tribunal deriving its authority from the United States.

In the case of *The Antelope,* 10 Wheaton 66, Judge Marshall says:

> "The courts in no country execute the penal laws of another."

This statement of Chief Justice Marshall was in the subsequent case of *Huntington* v. *Attrill,* 146 U. S. 657, referred to by Justice Gray as:

> "The fundamental maxim of international law."

In this latter opinion it is stated that:

> "Crimes and offenses against the laws of any state can only be defined, prosecuted and pardoned by the sovereign authorities of that state; and the authorities, legislative, executive or judicial, of other states, take no action with regard to them, except by way of extradition to surrender offenders to the state whose laws they have violated and whose peace they have broken."

We submit, therefore, that it is quite clear from the uniform opinions of this court, that, if Stout is guilty of the crime of murder, his offense is against the laws of the United States, and not against the laws of Oklahoma; that only

the United States can punish him for his offense.

> "Congress could not through the provisions of the Enabling Act, and they did not attempt by this act to transfer jurisdiction to the state courts to try offenses against the United States over which there was no *Federal case pending* at statehood."

All of the provisions of the Enabling Act and State Constitution deal with *pending cases.* The case vs. Stout was not a pending case at statehood. He had been bound over by a Commissioner but no indictment returned. Until indictment was found the case was not *pending.*

Congress never intended to impose upon the State the burden of prosecuting offenses committed against the Federal Government where no case was pending at Statehood.

The act of admission creates a state upon an equal footing with every other state, and by this Act of admission, a division and distribution of the sovereignty is brought about. Hence to burden a state with the prosecution of criminal offenses committed in the country under the control of Congress would be an unequal burden, and prevent that equality guaranteed under the Enabling Act to the state and be assuming to transact business at its own expense arising under a foreign jurisdiction.

Shirley v. *Bowlby*, 152 U. S. Op. 34, 38 L. C. P. Op. 344.
Pollard v. *Hogan*, 13 How. (U. S.) 233, 11 L. C. P. 565.
Permoli v. *Municipality*, 3 How (U. S.) 590, 11 L. C. P. 739.
Strader v. *Graham*, 10 How. (U. S.) 92, 13 L. C. P. 337.
Spooner v. *McConnell*, 22 Fed. cases No. 13, 245.
Benner v. *Porter*, 9 How. (U. S.) 239, 13 L. C. P. 119.
Hunt v. *Palao*, 4 How. (U. S.) 589, 11 L. C. P. 1115.
Calking v. *Cocke*, 14 How. (U. S.) 237.

If Congress had the power to transfer this jurisdiction to the state courts, the power of the sovereignty exercised by the Congress to create a court and attach jurisdiction thereto to hear and determine causes of action, accruing within the Territory before the admission of the State, is supreme and is exclusive; and inasmuch as it failed to act, the right of action is in suspense until Congress does act creating the court, or the jurisdiction to the court, or both, and which must be a Federal Court.

Forsythe v. *U. S.*, 9 How. (U. S.) 571, 13 L. C. P. 263.
U. S. v. *Baum*, 74 Fed. 43.
U. S. v. *Pastello*, 48 Fed. 677.

McNulty v. *Batty*, 10 How. (U. S.) 72, 13 L. C. P. 333.

Freeborn v. *Smith*, 12 Wall. (U. S.) 160, 169 U. S. 177, 17 L. C. P. 922.

U. S. Express Co. v. *Kuntz*, 18 Wall. (U. S.) 342, 19 L. C. P. 457.

Koeningberger v. *Richmond*, 158 U. S. 41.

Jones v. *U. S.* 137 U. S. 112.

Ames v. *Colo. Cen. Ry. Co.* Fed. cases 342.

Spooner v. *McConnell*, 22 Fed. cases, 13, 245.

Benner v. *Porter*, 9 How. (U. S.) 239, 13 L. C. P. 119.

Inerarity v. *Curtis & Griswold*, 4 Fla. 175.

Carter v. *Bennett*, 4 Fla. 322.

Cooke v. *U. S.*, 138 U. S. 157.

Larkin v. *Saffarens*, 15 Fed. Op. 153.

Railroad Co. v. *Grant*, 98 U. S. 398.

South Car v. *Gaillard*, 101 U. S. 433.

Ex parte McCardle, 7 Wall (U. S.) 514.

Judicial duty is not less fitly performed by declining ungranted jurisdiction, than in exercising firmly that granted.

In construing the constitution or statute granting judicial powers, such constitution or statute reciting conditions or subjects over which jurisdiction is extended must be construed as restrictive, and is not to be extended by implication or inference to or over subjects not designated.

Ex parte McCardle, 7 Wall (U. S.) 514.
Murdock v. *Memphis*, 20 Wall. (U. S.) 620.
Northpoint & Co. v. *Utah & Co.*, 14 Utah 163, 168, 46 Pac. 824, 27, 28.
U. S. v. *Bailey*, 24 Fed. cases 14, 495.
Duransseau v. *U. S.*, 6 Cranch (U. S.) 308.
Jangk v. *Halbrook* (U. T.), 62 A. M. St. 921 Op. 925.
Eastman v. *Gurrey*, 14 Utah 171-73, 46 Pac. 828-29.
Farrell v. *Winchester etc. R. R. Co.*, 61 Conn, 130, 23 At. 757.

The court should decline jurisdiction:

Myers v. *Herrera*, 41 Fed. 67.
In re Cilley, 58 Fed. 984.
State v. *Weeks*, 38 Mo. App. 579.
Railroad Co. v. *Grant*, 98 U. S. 398.
South Car. v. *Gaillard*, 101 U. S. 433.

Territory is not vested with power of Eminent Domain except expressly given by Act of Congress.

Vol. 1 Lewis Eminent Domain Sec. 237 bottom pages 562-63.
Eminent Domain of Texas, 8 Op. Atty. Gen. 334.

The United States Supreme Court has frequently construed the paragraph in the case of *Benner* v. *Porter*, *supra*, under which the State

seeks to, by construction, to infer that the Enabling Act gives consent for the State to initiate this prosecution, that is, by commenting on and analyzing the entire case, and in each case and every case so analyzing the Porter case, neglects to enforce the suggestion of implication or inference or implying consent—so also the Congress in its various acts admitting the States neglects to so construe this part of the opinion in the Porter case—by all of which apparently the law is settled at the present time against this doctrine of implication or consent by implication.

The case referred to being 9 How. 571; 10 How. 62; 12 Wall, 160; 18 Wall. 342; 158 U. S. 41; Fed. cases No. 342. The Enabling Acts admitting states being there set out and mentioned in case 18 Wall 342, *supra*, and thereafter in the Enabling Acts for Nevada, North and South Dakota and Utah.

The Enabling Act or any amendment thereof, fails to designate or provide for the prosecution for crimes or offenses committed before the passage of the Act in which indictments had not been found or proceedings instituted before the admission of the State in the Union, that is, fails to provide jurisdiction when and where such offenses may

be prosecuted, unless under the 14th section, offenses of murder committed under the circumstances and time set forth in this action is made tryable in the Federal Court.

It is immaterial what the State has done if the Enabling Act does not contain a provision covering the jurisdiction of the such offense.

In the nature of things there can be no successor to the Territory of Oklahoma or Indian Territory. The courts and officers, legislative and judicial, go out of existence absolutely and entirely upon the admission of the State, the records of the courts only remain. No right of jurisdiction thereunder can, as above stated, remain. The state court may succeed to the right of possession of the records but not to the right of jurisdiction in the court. So the counties may succeed to the right of possession of the records of that county.

There is no succeeding or taking the place of a territorial court by the state court, and couldn't be made so by law by reason of the non-existence of the Territory Court.

As to what is meant by successor, see:

Davis v. *Garr*, 6 N. Y. 133.
State v. *Andrews*, 64 Kas. 496.
21 Am. & English Encl. of Law, p. 360.

Also see the Florida case above cited.

The surety is not liable because the sheriff had the prisoner in charge upon the liquor charge and permitted him to escape.

"Stout was charged before the United States Commissioner with two offenses: Selling liquor and adultery. The bond now in suit was given to secure the appearance of Stout upon *each of these charges. Not one* but both of them. It was one and the same bond made to cover both offenses (See bond, Record 25 and 38). Stout had ben permitted to stand upon this bond until after he was indicted, then arrested anew by the sheriff and allowed to escape. (See evidence of the Sheriff [Tatum], Record, page 36).

"The surety was the jailer of the defendant Stout, and the surety was entitled to the unmolested custody of the person of the prisoner, and was not to be interfered with in the exercise of this posession and control. When the sheriff interfered with this possession and control the bond was there *instanta* released, and the surety no further bound or obligated."

Sternberg v. *State*, 42 Ark. 127.
State v. *Jones*, 29 Ark. 127.
Carter v. *State*, 43 Ark. 132.
5 Cyc., page 30 (11), note 67.
3 Am. & Eng. Cyc., page 718 (b) note 3.
21 Am. St. Rep. 232.
48 Iowa 343.
53 Ky. (14 B. Mon.) 291.
74 Ky. (11 Bush.) 605.
11 N. W. 317.

People v. *Stager*, 10 Wend. 431.
Peacock v. *State*, 44 Tex. 11.
Lindley v. *State*, 17 Tex. App. 120.
Roberts v. *State*, 22 Tex. 64.

We respectfully submit that the case should be reversed and remanded to the Supreme Court of the State of Oklahoma with directions that it reverse the judgment of the District Court of Pittsburg County, Oklahoma, with directions that that court vacate its judgment against this defendant, Southern Surety Company.

C. S. Arnold,
McAlester, Oklahoma,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States

October Term 1915

Southern Surety Company,
Plaintiff in Error,
vs.
The State of Oklahoma.

No. 124

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR DEFENDANT IN ERROR.

This case involves the construction of Sections 16 and 20 of the Enabling Act of Congress for the State of Oklahoma as amended by Act of Congress of March 4, 1907, and Sections 27 and 28 to the Schedule to the Constitution of Oklahoma accepting such provisions on the part of the State.

It is impossible within the time now given to prepare and have printed an elaborate argument in this case. We shall present merely the cases we think in point, with short comment.

Prior to Statehood the crime of adultery committed in the Indian Territory was prosecuted under an act of Congress known as the "Edmunds-Tucker Act," 24 Stat. 635.

By Section 16 of the Enabling Act as amended it is provided as follows:

> "Prosecutions for all crimes and offenses committed within the Territory of Oklahoma or in the Indian Territory, pending in the district courts of the Territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a State, would have been cognizable in the Federal courts, shall be transferred to and be proceeded with in the United States circuit or district court established by this act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a State."

Section 28 of the Schedule to the Constitution provides as follows:

> "The terms and provisions of an Act of Congress, entitled 'An Act to Amend Sections Sixteen, Seventeen and Twenty of an Act entitled "An Act to enable the people of Oklahoma and Indian Territory to form a Constitu-

tion and State Government and be admitted into the Union on an equal footing with the original States; and to enable the people of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the original States,' " are hereby accepted, and the jurisdiction of the cases enumerated therein is hereby assumed by the courts of the State."

In *Benner et al* v. *Porter*, 9 Howard, beginning on page 246, this honorable Court said:

"On the admission of a Territorial government into the Union as a State, the concurrence of both the Federal and State governments would seem to be required in the transfer of the records, in cases of appropriate State jurisdiction, from the old to the new government. An Act of Congress would be incapable of passing them under the State jurisdiction, as would be an act of the Legislature of the State to take the records out of the custody of the Federal government. Both should concur.

"The like concurrent legislation would also seem to be required in respect to cases pending in this Court for review on writs of error or appeal from the Territorial courts, which appropriately belonged to State jurisdiction, to enable us to send down the mandate to the proper State tribunal for any further proceedings that might be necessary in the cause. Otherwise, Congress itself should specially provide for the execution of the mandate.

"We have said that the assent of Congress was essential to the authorized transfer of the records of the territorial courts, in suits pending at the time of the change of government, to

the custody of state tribunals. It is proper to add, to avoid misconstruction, that we do not mean thereby to imply or express any opinion on the question, whether or not, without such assent, the state judicatures would acquire jurisdiction. That is altogether a different question. And, besides, the acts of Congress that have been passed, in several instances, on the admission of a state, providing for the transfers of the Federal causes to the District Court, as in the case of the admission of Florida, already referred to, and saying nothing at the time in respect to those belonging to state authority, may very well imply an assent to the transfer of them by the state to the appropriate tribunal. Even the omission on the part of Congress to interfere at all in the matter may be subject to a like implication. And a subsequent assent would, doubtless, operate upon past acts of transfer by the state authority.

"It is to be regretted that proper provision has not always been made by Congress, upon a change of government, in respect to the pending business in the territorial tribunals, so as to remove all embarrassment and perplexity on the subject.

"From the examination we have given to the legislation upon the admission of several of the new states into the Union, we have found but few instances of any provision having been made in respect to the cases pending in the old government; and those are limited to the transfer of the Federal cases to the District Court organized in the new State. In some of the constitutions of the states, provision had been made for the pending business of appropriate state jurisdiction; but not in all of them. A very

slight attention to the subject by Congress, at the time, would remove all the difficulties that have occurred in several of the state recently admitted."

By Section 3 of Article 4 of the Constitution of the United States, it is provided that "new states may be admitted by Congress into this Uinon," and by Section 8 of Article 1 thereof, it is provided that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or any department or officer thereof." Certainly under such a grant of power Congress, by the concurrence of the people of the state, would have authority to make a distribution of the causes pending in territorial courts along Federal and state lines, such as was necessary and proper. Congress provided for the admission of Oklahoma as a state upon an equal footing with the other states. In our government but one kind of state is known, and that is a state admitted upon an equal footing with the other states. Hence it must appear that Congress intended in providing for the transfer of the causes pending in the territorial courts at the time of the admission of this state into the Union that each case should be considered as if a state government existed at the time of the commission

of the alleged offense; and if, in that condition it would have been a state case, then the state court should assume jurisdiction and if it would have been a Federal case, then the United States should assume jurisdiction. Since the organization of the government thirty-two states in addition to Oklahoma had been admitted to the Union at the time of the admission of Oklahoma, and in not one of them so far as we have been able to discover, has the question been raised as to whether or not the power rested in Congress and the new state to provide for a proper distribution of the pending causes. The rule followed for such distribution has always been along the lines laid down by the Oklahoma Enabling Act and the Constitution, that is, that offenses which, if committed in the state would have been tried within the state court should be transferred to the state courts, and if triable in the Federal courts then transferred to the Federal courts. This has been the practice of the government in the formation of new states since its organization, and this long established custom the courts will certainly not disturb unless there be some very good reason for so doing.

It is now some eight years since Oklahoma was admitted into the Union. During that period of time innumerable causes have been triad in this state which were pending in the Indian Territory prior

to statehood under the laws of the United States. In the case of *Higgins* v. *Brown,* 20 Okl., page 355, 94 Pac. 703, the Supreme Court of this State decided that it had jurisdiction in an appeal from a conviction of murder committed in the Indian Territory prior to statehood. Since that decision it would be safe to say that at least fifty persons were convicted of the crime of murder in the state courts where the offense was committed in the Indian Territory prior to statehood. Many of these persons are now serving terms in the penitentiaries of this state, and a condition such as this where the practice has been so long continued should not be disturbed at this late day unless a clear showing is made that Congress is without power to confer and the State without power to accept this jurisdiction.

In the case of *Benner* v. *Porter, supra,* this honorable court has clearly indicated that Congress has power to confer this jurisdiction if the same is accepted and concurred in by the state. It is clearly apparent from the Oklahoma Enabling Act and the Constitution that the jurisdiction of the offense of adultery committed in the Indian Territory prior to statehood where the cause was pending in the territorial courts was conferred upon the state courts and accepted by the state. The language is unam-

biguous. The question involved is simply one of power and there is an unbroken line of decisions in the courts of the states admitted to the Union where similar provisions have prevailed, where the question of such power has never been controverted, among which are the following cases:

Damson's Case, 6 Greenl. (Me.) 148.
Hudspeth v. *State*, 1 Ark. 20.
Drummond v. *The Republic of Texas*, 2 Texas 157.
People v. *Richards*, 1 Mich. 217.
Cook et al. v. *United States*, 1 G. Greene (Ia.) 56.
Bonsell v. *U. S.*, 1 G. Greene (Ia.) 112.
People v. *Daniels*, 1 Calif. 107.
People v. *Bonds*, 1 Nevada 31.
People v. *Logan*, 1 Nevada 110.
Wilson v. *People*, 3 Colo. 325.
State v. *Williams*, 9 Mont. 179.
State v. *Leehman*, 2 S. Dak. 174.
Thompson v. *State of Utah*, 170 U. S. 344.

In the case of *Higgins* v. *Brown*, *supra*, the Supreme Court of this state say:

> "In the Constitution of the states under which said territories were admitted into the Union were contained provisions for the continuance of all prosecutions. Unless it was so clear and evident as to reach a moral certainty that Congress did not have the power expressly or by reasonable implication, after a century of acquiescence in same, when new states were admitted into the Union, to provide for the state to assume jurisdiction of cases of a local nature arising under the territorial government, this

court will not at this late date declare such provisions to be void. But what provision in the federal Constitution gives the defendant the right to demand to be tried in a federal tribunal for an offense committed under the territorial form of government, after it has ceased to exist? We have been cited to none.

"The sixth amendment to the Federal Constitution is as follows:

" 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *state* and *district* wherein the crime shall have been committed, which district shall have *previously been ascertained by law*, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.'

"The only clause in this provision which might be made the subject of argument on the constitutional question is the clause, 'which district shall * * * have been previously ascertained by law,' and under the decisions of the Supreme Court of the United States this provision would not be applicable in a case such as we have under consideration. The Supreme Court has held repeatedly that the sixth amendment applies only to the case of offenses against the laws of the United States committed within the limits of a state, and does not apply to those offenses committed within one of the territories of the United States.

"In the case of *United States* v. *Dawson*, 15 How. (U. S.) 467, 14 L. Ed. 775, an indict-

ment had been returned in the Circuit Court of the United States for the District of Arkansas, charging murder in the Indian Territory, west of the State of Arkansas. A motion was made on behalf of the defendant to quash the indictment, and one of the points urged by the counsel for the defendant was the jurisdiction of the court in which the case was being tried. The judges being divided in opinion concerning certain questions of law, the case came before the Supreme Court of the United States upon a certificate of division. Mr. Justice Nelson, in delivering the opinion of the court, in referring to the sixth amendment to the Constitution, said:

" 'It has been supposed that a provision in the sixth amendment to the Constitution of the United States has a bearing upon this question, which provides that "in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." The argument is that, since the erection of the new district out of the nine western counties in the state, together with the Indian country, it is not competent for the circuit court, in view of this amendment, to try the prisoners within the remaining portion of the old district, inasmuch as that amendment requires the district within which the offense is committed and the trial is to be had must be ascertained and fixed previous to the commission of the offense.'

"In the case of *Jones* v. *United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691, which was an indictment for murder, the Supreme Court, in referring to the sixth amendment, said:

" 'By the Constitution of the United States, while a crime committed within any state must be tried in that state and a district previously ascertained by law, yet a crime not committed within any state of the Union may be tried at such place as Congress may by law have directed.'

"And in the case of *Cook* v. *United States*, 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906, the Supreme Court, in considering this provision of the Constitution, held to the same effect.

"It will be observed by the above cases that the sixth amendment does not apply in any case where a proceeding is instituted outside of the jurisdiction of a state for a violation of the laws of the United States. The question is settled by abundant authorities. The power of Congress to designate the place of trial of criminal cases, regardless of the sixth amendment, outside of the jurisdiction of a state, cannot be successfully attacked."

We conclude from the foregoing authorities that it was within the power of Congress to confer and within the power of the State to accept jurisdiction of the cause pending in the territorial court of the Indian Territory in which this appellant became surety, and as that is the only Federal question involved in this appeal we respectfully submit that the judgment of the Supreme Court of this State should be affirmed.

S. P. Freeling,
Attorney General of Oklahoma,
R. E. Wood,
Assistant Attorney General.
Smith C. Matson,
Assistant Attorney General.

SOUTHERN SURETY COMPANY *v.* STATE OF OKLAHOMA.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 124. Submitted December 9, 1915.—Decided June 12, 1916.

By reason of the conditions arising out of the presence of the Five Civilized Tribes no organized territorial government was ever established in the Indian Territory; and, in the absence of an organized local government, prosecutions for crime were, regardless of their nature, commenced and prosecuted in the name of the United States.

Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way.

Adultery is a punishable offense only when the common or statute law of the State so makes it, and where punishable, it is cognizable only in the courts of the State.

Forts, arsenals and like places within the exterior limits of a State, but over which exclusive jurisdiction has been ceded to the United States, are not regarded as a part of the State but are excepted out of it.

Quære whether Congress can deal with the crime of adultery committed by tribal Indians within a State.

Under §§ 16 and 20 of the Oklahoma Enabling Act and schedule 28 of the constitution of Oklahoma, the State took the place of the United States in regard to a prosecution for adultery, neither of the parties thereto being Indians, commenced in Indian Territory in one of the temporary courts of the United States, and all essential parts of the prosecution including the bail bond of which the United States was obligee passed to the State with power of enforcement thereof.

34 Oklahoma, 781, affirmed.

THE facts, which involve the construction of the Oklahoma Enabling Act and the jurisdiction of the state court of cases formerly pending in the temporary courts of Indian Territory, are stated in the opinion.

Mr. C. S. Arnold for plaintiff in error.

Mr. S. P. Freeling, Attorney General of the State of Oklahoma, *Mr. R. E. Wood* and *Mr. Smith C. Matson*, for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is an action on a bail bond given by an accused held upon a charge of adultery to await the action of the grand jury at McAlester in the Indian Territory. The bond was given shortly before Oklahoma became a State, named the United States as the obligee and called for the accused's appearance before the temporary court of McAlester at the next term and from term to term until discharged. When the courts of the new State were organized an indictment for the adultery was returned against the accused in the state court at McAlester. He did not appear, a forfeiture was declared and the State sued on the bond, the surety alone being reached by the process. There was a judgment for the State, which

was affirmed, 34 Oklahoma, 781, and the surety sued out this writ of error.

The Federal questions presented involve the construction and application of the Enabling Act and are, first, whetherafter the admission of the State the further proceedings upon the charge of adultery were to be had in a Federal court or in a state court, and, second, whether by operation of law the State became the beneficiary of the bond and entitled to sue on it.

By reason of the conditions arising out of the presence of the Five Civilized Tribes no organized territorial government was ever established in the Indian Territory. Up to the time it became a part of the State of Oklahoma it was governed under the immediate direction of Congress, which legislated for it in respect of many matters of local or domestic concern which in a State are regulated by the state legislature, and also applied to it many laws dealing with subjects which under the Constitution are within Federal rather than state control. In what was done Congress did not contemplate that this situation should be of long duration, but on the contrary that the Territory should be prepared for early inclusion in a State. Courts designated as "United States courts" were temporarily established and invested with a considerable measure of civil and criminal jurisdiction, and there was also provision for beginning public prosecutions before subordinate magistrates. There being no organized local government, such prosecutions, regardless of their nature, were commenced and conducted in the name of the United States, and in taking bail bonds it was named as the obligee.

The Enabling Act, June 16, 1906, c. 3335, 34 Stat. 267; March 4, 1907, c. 2911, *ibid.* 1286, provided that the new State should embrace the Indian Territory as well as the Territory of Oklahoma. It contemplated that the State, by its constitution, would establish a system of courts of its own, and provided for dividing the State into two dis-

tricts and creating therein United States courts like those in other States. The temporary courts were to go out of existence and this made it necessary to provide for the disposition of the business pending before them in various stages. To that end the following provisions, among others not material here, were embodied in an amendment to the act, 34 Stat. 1286, 1287:

"Sec. 16. . . . Prosecutions for all crimes and offenses committed within the Territory of Oklahoma or in the Indian Territory, pending in the district courts of the Territory of Oklahoma or in the United States courts in the Indian Territory upon the admission of such Territories as a State, which, had they been committed within a State, would have been cognizable in the Federal courts, shall be transferred to and be proceeded with in the United States circuit or district court established by this Act for the district in which the offenses were committed, in the same manner and with the same effect as if they had been committed within a State."

"Sec. 20. That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said Territory become a State, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States courts in the Indian Territory; . . . All criminal cases pending in the United States courts in the Indian Territory, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be prosecuted to a final determination in the State courts of Oklahoma under the laws now in force in that Territory."

Section 28 of the schedule to the state constitution referred to these and other closely related provisions and

said, they "are hereby accepted and the jurisdiction of the cases enumerated therein is hereby assumed by the courts of the State."

Thus by the concurrent action of Congress and the State all prosecutions, pending in the temporary courts of the Indian Territory, for offenses which would not have been cognizable in a court of the United States had they been committed within a State, were to be proceeded with in the courts of the State, as successors to the temporary courts. In other words, the test of the jurisdiction of the state courts was to be the same that would have applied had the Indian Territory been a State when the offenses were committed. In this view it is plain that the prosecution in question was rightly proceeded with in the state court. Adultery is an offense against the marriage relation and belongs to the class of subjects which each State controls in its own way. It is a punishable offense only where the common or statute law of the State makes it such, and where punishable, it is cognizable only in the courts of the State. Of course, we exclude from present consideration forts, arsenals and like places within the exterior limits of a State, but over which exclusive jurisdiction has been ceded to the United States, because they are regarded, not as part of the State, but as excepted out of it. And we pass the question of the power of Congress to deal with such offenses in respect of tribal Indians within a State, because the statute under which this prosecution arose was general in its terms, and because it is not claimed that either of the participants in the adulterous act was an Indian.

Some reliance is placed upon § 14 of the Enabling Act, which refers in part to offenses committed prior to the State's admission, but of this section it is enough for present purposes to say that when it is read in connection with the provisions of §§ 16 and 20 before quoted it is apparent that it was intended to mark the line separating

the jurisdiction of the Federal courts in the two districts, as between themselves, and not the line separating their jurisdiction from that of the state courts.

Because no indictment was returned in the temporary court at McAlester before the State was admitted, it is contended that this prosecution was not "pending" in that court in the sense of §§ 16 and 20. These sections included all pending "causes, proceedings, and matters," as well as "prosecutions" and "cases," and evidently were designed to be very comprehensive. The accused not only was held by a magistrate to await the action of the grand jury at the next term of the temporary court, but gave bail for his appearance in the court at that term. After this was done we think a prosecution or proceeding was pending in the court in the sense of the statute. That no indictment was returned in that court is explained by the fact that the court, through the State's admission, went out of existence before an indictment could be found and returned in regular course.

The Enabling Act and the state constitution united in declaring that the state courts, in respect of the prosecutions which were to be transferred to them, should be the successors of the temporary courts. The bail bond was given several months after the act and the state constitution were adopted. Indeed, the State's admission was imminent at the time. So, the bond must be taken as given with the approaching change in mind and as meaning that the accused's appearance should be in the state court as the legal successor of the temporary court, if the latter should go out of existence before the time for appearance arrived. The law existing when a contract is made and affecting its performance becomes a part of it. *Northern Pacific Ry. Co.* v. *Wall, ante,* p. 87.

The Enabling Act, when taken in connection with the schedule to the state constitution, leaves no doubt that the State was to take the place of the United States in

dealing with and conducting this prosecution. The bail bond was essentially a part of the proceeding that was transferred and was without force or value in any other connection. So, when the power and duty resting upon the United States were passed to the State there went with them the right to use and enforce the bond as the United States might have done, had the proceeding remained in its control; in other words, the State became by operation of law the beneficiary of the bond, and was entitled to sue on it when its condition was broken.

Judgment affirmed.